No. 86-1758

Supreme Court, U.S.
FILED
MAY 1 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

WATERWAYS ASSOCIATION OF PITTSBURGH,
Appellant,

v.

HERSCHEL H. ROSE, III, STATE TAX COMMISSIONER OF WEST VIRGINIA,
Appellee,

On Appeal from the Circuit Court of Kanawha County of West Virginia

JURISDICTIONAL STATEMENT

BURGESS L. DOAN
Counsel of Record
1900 Carew Tower
Cincinnati, Ohio 45202
(513) 621-1506

G. Thomas Battle
Suite 1200 United Center
P.O. Box 273
Charleston, West Virginia 25321
(304) 344-4081

Counsel for Appellant

Of Counsel:

Walker, Chatfield & Doan
1900 Carew Tower
Cincinnati, Ohio 45202

April 30, 1987

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

QUESTIONS PRESENTED

I Whether the tax imposed by West Virginia Code § 11-15A-13 is an impermissible exercise of the State's jurisdiction over the interstate navigable waterways within that State, the construction, operation, maintenance, taxation, and regulation of which has been preempted by the Federal Government.

II Whether the tax imposed by West Virginia Code § 11-15A-13 is an unconstitutional burden on interstate commerce in violation of the Commerce Clause, Article I, Section 8, Clause 3, and the Due Process Clause of the United States Constitution.

III Whether the tax imposed by West Virginia Code § 11-15A-13 constitutes a Duty of Tonnage, prohibited by Article I, Section 10, Clause 3 of the United States Constitution.

IV Whether the tax imposed by West Virginia Code § 11-15A-13 is prohibited under the terms of the Northwest Ordinance of 1787 and the Virginia Compact of 1789.

PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

The Waterways Association of Pittsburgh is made up of various companies, none of which are listed in the caption of this case. The members and their corporate relationships are as follows:

Allegheny Power Service Corporation

Allegheny Power Service Corporation is a wholly-owned subsidiary of Allegheny Power System, Inc. and is affiliated with the following Companies:

Allegheny Generating Company
Allegheny Pittsburgh Coal Company
Allegheny Power Service Corporation
Allegheny Power System, Inc.
Monongahela Power Company
The Potomac Edison Company
West Penn Power Company
West Penn West Virginia Water Power Company
West Virginia Power and Transmission Company

Allegheny Towing, Inc.

Allegheny Towing, Inc. does not have an ownership interest in any subsidiaries (excepting wholly-owned subsidiaries) and is not affiliated with any companies.

Bellaire Marine Services, Inc.

Bellaire Marine Services, Inc. does not have an ownership interest in any subsidiaries (excepting wholly-owned subsidiaries) and is not affiliated with any companies.

The Buncher Company

The Buncher Company does not have an ownership interest in any subsidiaries (excepting wholly-owned subsidiaries) and is not affiliated with any companies.

Campbell Barge Line, Inc.

Campbell Barge Line, Inc. is a wholly-owned subsidiary of Blue Danube and is affiliated with Haney Barge Line, Inc., Campbell Transportation Company, Upper Ohio Towing, Inc., and C & C Marine Maintenance.

Campbell Barge Line, Inc. does not have an ownership interest in any subsidiaries (excepting wholly-owned subsidiaries).

Consolidation Coal Company

Consolidation Coal Company is a wholly-owned subsidiary of Dupont and is affiliated with Fairmont Supply Company and Conoco Oil.

Consolidation Coal Company does not have an ownership interest in any subsidiaries (excepting wholly-owned subsidiaries).

Crain Brothers, Inc.

Crain Brothers, Inc. does not have an ownership interest in any subsidiaries (excepting wholly-owned subsidiaries) and is not affiliated with any companies.

Crounse Corporation

Crounse Corporation does not have an ownership interest in any subsidiaries (excepting wholly-owned subsidiaries) and is not affiliated with any companies.

Davison Sand & Gravel Company

Davison Sand & Gravel Company does not have an ownership interest in any subsidiaries (excepting wholly-owned subsidiaries) and is not affiliated with any companies.

Dravo Mechling Corporation

Dravo Mechling is a wholly-owned subsidiary of Dravo Corporation and is affiliated with the following companies:

Dravo Arabia, Ltd.
Dravo de Mexico
S.A. de C.V.
Dravo — Okura Company, Ltd.
Dravotec, S.P.A.
P. T. Triweger
Training Institute for Dredging, B.V.
Gibbs & Hill Espanola, S.A.
Gibbs & Hill Iran
Filipinas Dravo Corporation
Potomas Sand & Gravel
Lemont Harbor & Fleeting Services, Inc.
EFISA, S.A.
Chuchwal de Wenger
International, Ltd.
Gibsin Engineers, Ltd.
Q - G & H Chena, Ltd.
Capital City Stevedores
Stevedores, Inc.

Dravo Mechling does not have an ownership interest in any subsidiaries (excepting wholly-owned subsidiaries).

Freeport Terminals, Inc.

Freeport Terminals, Inc. is a wholly-owned subsidiary of Nicholas Enterprises and is not affiliated with any companies.

Freeport Terminals, Inc. does not have an ownership interest in any subsidiaries (excepting wholly-owned subsidiaries).

Haney Barge Line, Inc.

Haney Barge Line, Inc. is a wholly-owned subsidiary of Blue Danube and is affiliated with Campbell Barge Line, Inc., Campbell Transportation Company, Upper Ohio Towing, Inc., and C & C Marine Maintenance.

Haney Barge Line, Inc. does not have an ownership interest in any subsidiaries (excepting wholly-owned subsidiaries).

Indiana & Michigan Electric Company

Indiana & Michigan Electric Company is wholly-owned by American Electric Power Company, Inc. and is affiliated with the following companies:

Appalachian Power Company
American Electric Power Service Corporation
AEP Energy Services, Inc.
AEP Generating Company
Cedar Coal Co.
Central Appalachian Coal Company
Kanawha Valley Power Company
Southern Appalachian Coal Company
West Virginia Power Company
Columbus and Southern Ohio Electric Company
Colomet, Inc.
Conesville Coal Preparation Company, Inc.
Simco, Inc.
Franklin Real Estate Company
Indiana Franklin Realty, Inc.
Ohio Power Company
Blackhawk Coal Company
Price River Coal Co.
Kentucky Power Company
Kingsport Power Company
Michigan Electric Power Company
Michigan Power Company
Michigan Gas Exploration Co.
Cardinal Operating Company
Central Coal Company
Central Ohio Coal Company
Central Operating Company
Southern Ohio Coal Company
Windsor Power House Coal Company
Ohio Valley Electric Corporation
Indiana-Kentucky Electric Corporation
Twin Branch Railroad Company
Wheeling Electric Company

Indiana & Michigan Electric Company does not have an ownership interest in any subsidiaries (excepting wholly-owned subsidiaries).

Ingram Barge Company

Ingram Barge Company is a wholly-owned subsidiary of Ingram Industries, Inc. and is affiliated with the following companies:

Ingram Distribution Group, Inc.
Ingram River Equipment, Inc.
Ingram Towing Company
Ingram Transportation Company
Ingram Ohio Barge Company
Ohio Barge Line, Inc.
Tennessee Book Company
Ingram Periodicals, Inc.
IDG Financial Corporation
Ingram Service, Inc.
Ingram Software, Inc.
Ingram Software, Ltd.
Softeam, Inc.
Ingram Coal Company
Cravat Coal Export Company
Cravat Coal Export Company, Inc.
Tennessee Insurance Company
Ingram Financial Corporation
Ingram Management Company
Ingram Export Company
Johns Creek Coal Company
Resource Holdings, Inc.
Ingram Production Company
Ingram Terminal Company
RHI Corporation
Kondur Petroleum SA
Telecommunications Systems, Inc.
Ingram Petroleum Services, Inc.
Gulfco International Sales Corporation

Ingram Barge Company does not have an ownership interest in any subsidiaries (excepting wholly-owned subsidiaries).

M & O Marine, Inc.

M & O Marine, Inc. does not have an ownership interest in any subsidiaries (excepting wholly-owned subsidiaries) and is not affiliated with any companies.

M/G Transport Services, Inc.

M/G Transport Services, Inc. is a wholly-owned subsidiary of The Midland Company, and is not affiliated with any companies.

M/G Transport Services, Inc. does not have an ownership interest in any subsidiaries (excepting wholly-owned subsidiaries).

Mon River Towing, Inc.

Mon River Towing, Inc. is a subsidiary of Guttman Oil Company, the holding company for Mon River Towing, Inc., Guttman Realty, and Guttman Industrial Supply.

Mon River Towing, Inc. does not have an ownership interest in any subsidiaries (excepting wholly-owned subsidiaries).

The Ohio River Company

The Ohio River Company is a wholly-owned subsidiary of Midland Enterprises Inc., which is wholly-owned by Eastern Gas & Fuel Associates. The Ohio River Company is affiliated with the following companies:

Boston Gas Company
  Massachusetts LNG Incorporated
Boston Gas Products, Inc.
Charles Coal Company
Eastern Associated Capital Corp.
Eastern Associated Foundation (The)

Eastern Associated Real Estate Corp.
Eastern Associated Securities Corp.
Eastern Energy Systems Corp.
Eastern Exploration Corporation
Eastern Power Systems, Inc.
  Eastern Fairfield Corp.
Eastern Realty Corp.
Eastern Urban Services, Inc.
E G Leasing Corp.
Midland Enterprises, Inc.
  Boston Tow Boat Company
  Chotin Transportation, Inc.
  Eastern Associated Terminals Company
  Marine Equipment Company
  Midland Affiliated Company
  Federal Barge Lines, Inc.
    River Fleets, Inc.
  Capital Marine Supply, Inc.
  Hartley Marine Corp.
  Inland Water Propulsion Systems, Inc.
  Ohio River Terminals Company (The)
  Port Allen Marine Service, Inc.
  Omega Properties, Inc.
  Orgulf Transport Co.
  Red Circle Transport Co.
  United Barge Co.
    Heartland Transportation, Inc.
    Triangle Fleeting Corporation
Mystic Steamship Corporation
PCC Land Company, Inc.
Philadelphia Coke Co., Inc.
Western Associated Energy Corp.
  Delta Properties Corp.
  Eastern Associated Properties Corp.
  North Fork Energy Corp.
  Roaring Fork Coal Corp.
  Tremont Coal Corp.
  Western Associated Properties of Colorado Corp.

The Ohio River Company does not have an ownership interest in any subsidiaries (excepting wholly-owned subsidiaries).

Port Authority of Allegheny County

The Port Authority of Allegheny County does not have an ownership interest in any subsidiaries (excepting wholly-owned subsidiaries) and is not affiliated with any companies.

River Salvage Company, Inc.

River Salvage Company, Inc. does not have an ownership interest in any subsidiaries (excepting wholly-owned subsidiaries) and is not affiliated with any companies.

Shenango, Incorporated

Shenango, Incorporated is a wholly-owned subsidiary of the Boggs Group which is wholly-owned by the shareholders of the Aloe Coal Company.

Shenango, Incorporated does not have an ownership interest in any subsidiaries (excepting wholly-owned subsidiaries) and is not affiliated with any companies.

Union R.R. Company & Bessemer & Lake Erie Railroad Company

Union R.R. Company & Bessemer & Lake Erie Railroad Company is a subsidiary of U. S. X. and a sister company of Bessemer & Lake Erie Railroad.

Union R.R. Company & Bessemer & Lake Erie Railroad Company does not have an ownership interest in any subsidiaries (excepting wholly-owned subsidiaries).

Weirton Steel Corporation

Weirton Steel Corporation does not have an ownership interest in any subsidiaries (excepting wholly-owned subsidiaries) and is not affiliated with any companies.

Wheeling-Pittsburgh Steel Corporation

Wheeling-Pittsburgh Steel Corporation is the parent company of numerous wholly-owned subsidiaries and Harman Coal Company which is seventy-five percent owned. Harman Coal Company is currently in receivership.

The following companies are affiliates of Wheeling-Pittsburgh Steel Corporation:

Butler Brothers
Carryore, Ltd.
Empire Iron Mining Partnership
Hansand Steamship Corporation
Iron Ore Company of Canada
Itasca Pellet Company
Mesba-Cliffs Mining Company
Tilden Iron Ore Partnership
Wabush Iron Company, Ltd.
Wheeling-Nisshin, Inc.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	I
PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED	II
TABLE OF AUTHORITIES	XIII
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS	3
STATEMENT OF THE CASE	4
1. Proceedings Below, Federal Questions Raised	4
2. Statement of Facts	5
THE QUESTIONS PRESENTED ARE SUBSTANTIAL	8
I. The Decision Below Ignores The Fact That The Federal Government Has Preempted The Regulation And Taxation Of Water Transportation Activities On The Navigable Inland Waterways Along The Borders Of, And Within, The State of West Virginia	9
II. The Decision Below Frustrates The Important Federal Policy of Maintaining A National Navigable Waterway System As An Instrumentality Of Interstate Commerce And Is Contrary To The Holding Of This Court In *Helson* v. *Kentucky* and *General Motors Corp.* v. *Washington*	11
III. The Decision Below Violates The Duty of Tonnage Clause By Exacting A Tax On The	

Page

Use Of Fuel Consumed In Interstate Commerce Without The Consent Of Congress And Is In Conflict With This Court's Decision In *Southern S.S. Co.* v. *Portwardens* 21

IV. The Decision Below Violates Both The Letter And Spirit Of The Northwest Ordinance And The Virginia Compact Which Provide That "The River Ohio Shall Remain Free Without Any Tax, Impost, Or Duty Therefor" 25

CONCLUSION 30

APPENDIX

A Notice of Appeal to the United States Supreme Court From the Circuit Court of Kanawha, County, West Virginia 1a

B Order of the Supreme Court of Appeals of West Virginia Dated February 3, 1987, Refusing Petition for Appeal 3a

C Opinion and Final Order of the Circuit Court of Kanawha County, West Virginia Dated April 18, 1986 ..... 4a

D Constitution and Statutes 17a

E Enrolled Committee Substitute for Senate Bill No. 1 ..... 40a

TABLE OF AUTHORITIES

Cases	Page
American Oil Company v. *Neill*, 380 U.S. 451 (1965)	14
Bingaman v. *Golden Eagle Western Lines*, 297 U.S. 626 (1936)	15, 16, 17
Cannon v. *City of New Orleans*, 87 U.S. 577 (1874)	12, 23
Clyde Mallory Lines v. *Alabama*, 296 U.S. 261 (1935)	21, 22, 23
Commonwealth Edison Co. v. *Montana*, 453 U.S. 609, 647, n. 13 (1981)	19
Complete Auto Transit, Inc. v. *Brady*, 430 U.S. 274 (1977)	13, 18
Department of Revenue v. *Association of Washington Stevedoring Cos.*, 435 U.S. 734 (1978)	13
Eastern Air Transport, Inc. v. *South Carolina Tax Commission*, 285 U.S. 147 (1932)	15
Economy Light & Power Company v. *United States*, 256 U.S. 113 (1921)	28, 29
Edelman v. *Boeing Air Transport, Inc.*, 289 U.S. 249 (1933)	15
Evansville-Vanderburgh Airport Authority v. *Delta Airlines, Inc.*, 405 U.S. 707 (1972)	18, 19
General Motors Corp. v. *Washington*, 377 U.S. 436 (1964)	8, 12, 13
Helson v. *Kentucky*, 279 U.S. 245 (1929)	8, 10, 11, 12, 15, 16, 17
Huse v. *Glover*, 119 U.S. 453 (1886)	23
Ingels v. *Morf*, 300 U.S. 290 (1937)	19, 20
Maryland v. *Louisiana*, 451 U.S. 725 (1981)	13
Massachusetts v. *United States*, 435 U.S. 444 (1978)	10
Nashville, Chattanooga & St. Louis Railway v. *Wallace*, 288 U.S. 249 (1933)	15

Page

Northern Line Packet Co. v. *Keokuk*, 95 U.S. 80 (1877) 22, 23

Northwestern States Portland Cement Company v. *Minnesota*, 358 U.S. 450 (1959) 12, 13

Norton Co. v. *Dept. of Revenue*, 340 U.S. 534, 537 (1951) 13

Parkersburg & O.R. Transportation Co. v. *City of Parkersburg*, 107 U.S. 691 (1883) 23

Prudential Insurance Co. v. *Benjamin*, 328 U.S. 419 (1946) 21

Southern S.S. Co. v. *Portwardens*, 73 U.S. 31 (1867) ... 22, 23

State Tonnage Cases, 12 Wall (U.S.) 204 (1870) 21

United Airlines v. *Mahin*, 410 U.S. 623 (1973) 16, 17

Constitution and Statutes:

U.S. Const., art. I, § 8, cl. 3 ..... 1, 4, 11, 13, 17

U.S. Const., art. I, § 10, cl. 3 ..... 1, 4, 21, 23

U.S. Const., art. VI, cl. 2 9

U.S. Const., amend, XIV, cl. 4 ..... 11, 13

Inland Waterway Revenue Act of 1978, 26 U.S.C. § 4042 9

28 U.S.C. § 1257(2) 2

33 U.S.C. § 1801-§ 1804 9

Northwest Ordinance of 1787 ..... 1, 4, 25, 26, 28, 29

The Virginia Compact of 1789 ..... 1, 4, 25

W. Va. Code § 11-15-13 ..... passim

W. Va. Code § 11-15A-13 ..... passim

W. Va. Code § 11-15-18 ..... passim

Enrolled Committee Substitute For Senate Bill No. 1 .... 2, 5

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

WATERWAYS ASSOCIATION OF PITTSBURGH,
Appellant,

v.

HERSCHEL H. ROSE, III, STATE TAX COMMISSIONER OF WEST VIRGINIA,
Appellee,

On Appeal from the Circuit Court of Kanawha County of West Virginia

---

JURISDICTIONAL STATEMENT

Appellant, Waterways Association of Pittsburgh, appeals from the decision of the Circuit Court of Kanawha County, West Virginia rendered in this case on April 18, 1986, sustaining the validity of the tax imposed by West Virginia on the consumption of fuel by watercraft while plying the Ohio River within West Virginia. This jurisdictional statement is submitted to show that this Court has jurisdiction over this appeal and that substantial federal questions are presented.

OPINIONS BELOW

This case was commenced in the Circuit Court of Kanawha County, West Virginia as a declaratory judgment action seeking a determination that the fuel consumption tax on water-

craft be declared unconstitutional. The initial decision of the Circuit Court of Kanawha County, West Virginia, dated April 18, 1986, held the challenged tax valid from the date of its enactment through June 30, 1985. Because a reciprocal credit statute contained in the Multistate Tax Compact was repealed July 1, 1985, the tax was held to discriminate against interstate commerce. The Second Extraordinary Session of the 1986 West Virginia Legislature enacted Enrolled Committee Substitute for Senate Bill 1 to add West Virginia Code § 11-15A-10(a) which contained a new reciprocal credit provision to cure the discrimination. That court's decision holding the tax valid is not officially reported.

JURISDICTION

The West Virginia Supreme Court of Appeals refused to grant Appellant's Petition for Appeal by final order on February 3, 1987. A motion for leave to present a second application for appeal was filed March 2, 1987. This motion was denied on the grounds that it was filed out of time. A Notice of Appeal (Appendix A, infra, 1a) was timely filed with the Circuit Court of Kanawha County and with the West Virginia Supreme Court of Appeals on April 28, 1987 because of uncertainty as to the location of the record. The time within which to docket this appeal in this Court expires on May 3, 1987, and timely docketing has been made. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, art. I, § 8, cl. 3 (the Commerce Clause)

United States Constitution, art. I, § 10, cl. 3 (the Duty of Tonnage Clause)

United States Constitution, art. VI, cl. 2 (the Supremacy Clause)

United States Constitution, amend. XIV, § 1, cl. 4 (the Equal Protection Clause)

26 U.S.C.

28 U.S.C.

33 U.S.C.

Northwest Ordinance of 1787

The Virginia Compact of 1789

West Virginia Code § 11-15-13

West Virginia Code § 11-15A-13

West Virginia Code § 11-15-18

Enrolled Committee Substitute for Senate Bill No. 1

The text of each citation appears at Appendix D, infra, pp. 17a-40a.

STATEMENT OF THE CASE

1. Proceedings Below, Federal Questions Raised

Appellant challenges the validity of the excise tax imposed by West Virginia Code § 11-15A upon consumption of fuel by watercraft while plying the navigable waterways within the state of West Virginia. Appellant contends this tax violates provisions of the United States Constitution, the Northwest Ordinance, and the Virginia Compact.

Appellant's members are engaged in the business of transporting products by barge and other watercraft in interstate commerce on the inland waterways, including those parts of the Ohio River that are in West Virginia, on other navigable rivers of the State and on navigable rivers outside West Virginia. Since April 1, 1983, West Virginia has imposed an excise tax on the ". . . consumption in this state of gasoline or special fuel purchased outside the state at the rate of five percent of the average wholesale price of such gasoline or special fuel," on "motor carriers." The term "motor carrier" includes "watercraft."

Appellant filed a Complaint for Declaratory Judgment action in the Circuit Court of Kanawha County, West Virginia, seeking a determination by the Circuit Court that House Bill 1657, enacted by the West Virginia Legislature on February 18, 1983, amending Articles 15 and 15A of Chapter 11 of the West Virginia Code, violated provisions of the United States Constitution, the Northwest Ordinance and the Virginia Compact.

The Circuit Court ruled that the statute in question does not violate the Northwest Ordinance; is not a duty of tonnage prohibited by Article I, Section 10, Clause 3 of the United States Constitution; does not violate the Commerce Clause, Article I, Section 8, Clause 3 of the United States Constitution; and that the statute is constitutional and valid in every respect between the date of its enactment and June 30, 1985. On July 1, 1985, the reciprocal credit statute contained in the Multistate Tax Compact was repealed. The Court ruled that

after that date, West Virginia Code § 11-15A-13 discriminated against interstate commerce and was, therefore, unconstitutional because of no reciprocal credit with other states. The Second Extraordinary Session of the 1986 Legislature enacted Enrolled Committee Substitute for Senate Bill 1 adding West Virginia Code § 11-15A-10a which contained a reciprocal credit provision to cure the discrimination found by the Court. This corrective legislation, however, does not affect Appellant's challenge to the Circuit Court's decision.

Appellant seeks review of the Circuit Court's decision and final order upholding the validity of West Virginia Code § 11-15A.

2. Statement of Facts

On February 18, 1983, the West Virginia Legislature passed House Bill 1657, amending Articles 15 and 15A of Chapter 11 of the West Virginia Code (hereinafter sometimes referred to as "House Bill 1657"). House Bill 1657 became effective April 1, 1983, and provides for imposition of a tax on the sale, use or consumption in West Virginia of gasoline or special fuel.

West Virginia Code § 11-15A-13(a)(2) imposes an excise tax on the "use or consumption in this State of gasoline or special fuel purchased outside this State at the rate of 5% of the average wholesale price of such gasoline or special fuel," with a minimum price for purposes of computation of the tax fixed by the statute at 97¢ per gallon.

The computation of the fuel use tax to be paid by appellant's members requires a determination of all fuel used in West Virginia and sales tax paid on fuel purchased in the State. The amount of tax remitted is equal to the difference between the gross amount of tax calculated on all fuel used in West Virginia and the amount of sales tax paid on any of the fuel purchased in the State.

West Virginia Code § 11-15A-13(d) proscribes the steps for calculating the fuel use tax as follows:

> Every person who operates or causes to be operated a motor carrier in this State shall pay the tax imposed by this section on the average wholesale price of all gallons of gasoline or special fuel used in the operation of any motor carrier within this State, under the following rules:
>
> (1) The total amount of gasoline or special fuel used in the operation of the motor carrier within this State shall be that proportion of the total amount of gasoline and special fuel used in any motor carrier's operations within and without this State, that the total number of miles traveled within this State bears to the total number of miles traveled within and without this State.
>
> (2) A motor carrier shall first determine the gross amount of tax due under this section on the average wholesale value, determined under subsection (c), of all gasoline and special fuel used in the operation of the motor carrier within this State during the preceding quarter, as if all gasoline and special fuel had been purchased outside this State.
>
> (3) Next, the taxpayer shall determine the total tax paid under article fifteen of this chapter on all gasoline and special fuel purchased in this State for use in the operation of the motor carrier.
>
> (4) The difference between (2) and (3) is the amount of tax due under this article when (2) is greater than (3), or the amount to be refunded or credited to the motor carrier when (3) is greater than (2), which refund or credit shall be allowed in the same manner and under the same conditions as a refund or credit is allowed for the tax imposed by article fourteen-A of this chapter.

West Virginia Code § 11-15-18(c)(6) defines "motor carrier" to include "any aircraft, barge or other watercraft or locomotive transporting passengers or freight in or through this State."

Some of Appellant's members are motor carriers within the meaning of West Virginia Code § 11-15-18(c)(6) who are engaged in the business of transporting products by watercraft in interstate commerce on those parts of the Ohio River that are in the State of West Virginia, on other navigable rivers of the State, and on the Ohio River and other navigable rivers outside West Virginia.

The United States government has sole responsibility for the regulation, servicing and maintenance of the navigable waterways of which the Ohio, Kanawha, Big Sandy, and Monongahela Rivers are a part. The federal government also regulates and documents all vessels operated by Waterways Association members which travel on the navigable waters of the United States, including those within West Virginia. The sole means of power for the watercraft employed by Appellant's members in West Virginia waters is gasoline or special fuel as defined in West Virginia Code § 11-15-18(c). The amount of fuel consumed by the watercraft increases as the size and weight of the vessel increases.

The 1983 tax statute requires Appellant's members to pay taxes on the consumption of fuel in West Virginia even though they have no contact with West Virginia other than navigating in West Virginia waters. For example, a barge operated by a member of Waterways Association which leaves Pittsburgh, Pennsylvania, and travels to Cincinnati, Ohio, without stopping in West Virginia, is required to pay the tax on all fuel consumed while traveling that portion of the Ohio River in West Virginia waters. West Virginia Code §§ 11-15-18(g) and 11-15A-13(g) provides that all taxes collected under the provisions of House Bill 1657 must be used only for the construction, repair and maintenance of highways in West Virginia.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

This case presents substantial federal questions as to the power of the states to impose taxes that are prohibited by Congress. This is a matter of important national policy and constitutional doctrine. Maintenance of a navigable inland waterway system has long been recognized as vital not only to our economic development but also to the national defense. The tax imposed by West Virginia upon the consumption of fuel by watercraft plying the Ohio River through that state violates the Commerce Clause, the Due Process Clause, and the Duty of Tonnage Clause. The decision of the Circuit Court of Kanawha County upholding the tax is in irreconciliable conflict with this Court's opinions in *Helson* v. *Kentucky*, 279 U.S. 245 (1929), and *General Motors Corp.* v. *Washington*, 377 U.S. 436 (1964).

West Virginia has found a means of exacting a windfall tax from watercraft which has no connection to that state other than using the navigable waterways of that state. The creation, maintenance, improvement, regulation of navigable waterways, and taxation of water transportation has long been preempted by the Federal Government. Failure by this Court to consider this appeal would encourage other states along the Ohio and other navigable waterways to impose like taxes, which would stifle the flow of goods in interstate commerce. The questions presented by this appeal are, therefore, of substantial national importance. Review by this Court is necessary to assure that the inland waterways remain free from state control through the imposition of taxes which contravene the Commerce Clause, the Due Process Clause, the Duty of Tonnage Clause, and the Supremacy Clause of the United States Constitution.

I. JURISDICTION OF NAVIGABLE WATERWAYS INCLUDING THE JURISDICTION TO MAINTAIN, IMPROVE, REGULATE, AND TAX HAS BEEN PREEMPTED BY THE FEDERAL GOVERNMENT

The Federal Government has from the adoption of our Constitution preempted the creating, maintaining, improving, and regulating an inland waterway system which includes jurisdiction over navigable waterways. The utilization of our navigable waterways has played a vital role in the development of our country and especially the free flow of commerce among the various states. The inland waterways continue to play a vital role and the Federal Government has continued to maintain jurisdiction over navigable waterways pursuant to the Supremacy Clause of the Constitution. Art. VI, cl. 2.

For many years there was no separate taxation levied at the federal level designed to defray the cost of creating and improving the inland waterways. The Federal Government has now preempted the taxation of fuel use and consumption on inland waterways. The purpose of the tax is to raise the tax funds for the construction and rehabilitation of the inland waterway system in much the same fashion as taxes on fuel consumed by other motor carriers for maintaining roads and airports.

Title 26 U.S.C. § 4042 has imposed a tax on fuel used or consumed in river transportation for the purpose of raising revenue to construct and rehabilitate navigable waterways, including the Ohio River (from junction with the Mississippi River at RM 0 to junction of Allegheny and Monongahela Rivers at Pittsburgh, Pennsylvania at RM 0 981) as well as the navigable rivers within the state of West Virginia. 33 U.S.C. § 1804.

The Inland Waterways Revenue Act of 1978, Pub. L No. 95-502, 92 Stat. 1696 codified at 33 U.S.C. 1801-1804 (1982) 26 U.S.C. § 4042 (1982) represents the first tax measure ap-

plicable to users of inland waterways in the history of the United States. The act imposes a tax on fuel used by vessels and employed in commercial waterway transportation on any of 26 listed inland or intercoastal waterways. The revenues collected under the act are placed in an Inland Waterways Trust Fund to be used for construction and rehabilitation for navigation on the 26 waterways. The tax is referred to in the legislative history as a user tax. In hearings before the Congress *User Taxes for the Inland Waterways of the United States: Hearings on HR 8309 House Committee on Ways and Means, 95th Congress, 1st Session 2 (1977)*, Senator Stevenson pointed out that "a goal of the bill was to recover maintenance and construction costs and/or achieving intermodal equity by forcing waterway transport to pay its way like other modes of transport." The legislative history makes it clear that the jurisdiction over inland waterways, including the power to tax interstate commerce operating within that system has been preempted by the Federal Government. The Appellant recognizes, however, that this preemption has been held by this Court not to prohibit state and local revenue measures that operate *only* to compensate for benefits *actually* supplied. *Massachusetts* v. *United States*, 435 U.S. 444 (1978); *Helson* v. *Kentucky*, 279 U.S. 245 (1929). In *Cannon* v. *New Orleans*, 20 Wall, 577 (1874), this Court held that when an ordinance taxed wharves and or riverbanks indiscriminately rather than only the use of wharves built by the city, the exaction could not be justified as compensation for use of municipal facilities or services. It is clear in the instant case that the State of West Virginia provides no benefits to watercraft plying the Ohio River along its borders. Moreover, it is equally clear that the State of West Virginia does not in fact intend to utilize any funds raised by this tax to provide benefits to waterway users as the funds can only be used for West Virginia highways.

II. THE TAX IMPOSED BY WEST VIRGINIA CODE § 11-15A-13 IS AN UNCONSTITUTIONAL BURDEN ON INTERSTATE COMMERCE IN VIOLATION OF THE COMMERCE CLAUSE AND THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION.

West Virginia Code § 11-15A-13 imposes a tax on fuel consumed within the State of West Virginia by motor carriers. The term "motor carrier" as defined by the statute includes "a barge or other watercraft transporting passengers or freight in or through West Virginia." The tax imposed is calculated at five percent of the "average wholesale price" of fuel consumed. The revenue generated by this tax is dedicated to the repair and maintenance of the highways in West Virginia.

This tax as applied to the members of Waterways Association is an impermissible burden on interstate commerce in violation of the Commerce Clause and Due Process Clause of the Constitution of the United States.

This issue was addressed in *Helson* v. *Kentucky*, 279 U.S. 245 (1929) which presented a factual pattern very similar to that presented by the instant case. In that case the Commonwealth of Kentucky sought to impose a tax upon fuel consumed in Kentucky waters of the Ohio River by a ferryboat while traveling to and from the Commonwealth of Kentucky and the State of Illinois. The principal office and place of business of Helson, the taxpayer in that case, was within the State of Illinois. The fuel consumed by the ferryboat was purchased in the State of Illinois. However, seventy-five percent of the total fuel purchased for use by the ferryboat was consumed in Kentucky waters in connection with its river transportation business of making interstate journeys to and from Illinois and Kentucky. The Court found in that case the "tax is exacted as the price of the privilege of using an instrumentality of interstate commerce" and accordingly held that the tax was invalid.

In that case the ferryboat actually came to rest in the Kentucky waters of the Ohio River for the purpose of picking up and discharging passengers and cargo. In the instant case the State of West Virginia has exacted a tax on fuel consumed by watercraft while traveling the Ohio River notwithstanding the watercraft does not stop in West Virginia or have any contact with West Virginia. The West Virginia tax like the Kentucky tax is clearly a "tax exacted as the price of the privilege of using an instrumentality of interstate commerce."

Since *Helson*, the issue of whether a state tax is an impermissible burden on interstate commerce has been addressed in numerous factual settings. Those cases have fashioned tests that address Commerce Clause questions, Due Process Clause questions and Supremacy Clause questions.

As a prerequisite to taxation of interstate activities, due process requires a sufficient nexus between the taxing state and the activity which is being taxed. *General Motors Corp.* v. *Washington*, 377 U.S. 436 (1964); *Northwestern States Portland Cement Company* v. *Minnesota*, 358 U.S. 450 (1959).

While the Commerce Clause is not a barrier to state taxation of interstate commerce, such tax must relate to its fair share of support of state government. This clause, however, continues to protect interstate commerce from windfall taxes exacted by states which bear no relationship to benefits provided by the state. To insure that interstate commerce is not improperly burdened by state taxation, this Court has fashioned the following tests:

(1) the tax is applied to activities having substantial nexus with the state;

(2) the tax is fairly apportioned;

(3) the tax does not discriminate against interstate commerce; and

(4) the tax is fairly related to the services provided by the state.

Maryland v. *Louisiana*, 451 U.S. 725 (1981); *Department of Revenue* v. *Association of Washington Stevedoring Cos.*, 435 U.S. 734 (1978); *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274 (1977).

West Virginia Code § 11-15A-13 requires Waterways Association members to pay a tax on fuel consumed as they travel navigable waterways in and bordering West Virginia even though they have little or no connection with West Virginia. A review of the relevant facts as stipulated by the parties and the state statutes demonstrates conclusively that the tax at issue fails both the "substantial nexus" and the "fairly related to services provided" parts of the test and is, therefore, an impermissible burden on interstate commerce.

A. THE RIVER TRANSPORTATION BUSINESS OF WATERWAYS ASSOCIATION'S MEMBERS DOES NOT HAVE A SUBSTANTIAL NEXUS WITH WEST VIRGINIA

Under both the Commerce Clause and the Due Process Clause, the first question to be addressed in determining the constitutionality of the tax imposed by West Virginia Code § 11-15A-13 is whether the barge transportation activities of the members of Waterways Association have a substantial nexus with West Virginia.

It is necessary to look to the contact between the taxing state and the *transaction* it seeks to tax and not simply to the contact of the taxpayer with the state to determine whether there is the required nexus. Unless some local incident occurs sufficient to bring the transaction within the taxing power of the state, the vendor cannot be taxed on such transactions. *Norton Co.* v. *Dept. of Revenue*, 340 U.S. 534, 537 (1951). The mere entry into a state by a corporation does not take away from it the right to do interstate business with tax immunity. *General Motors Corp.* v. *Washington*, 377 U.S. at 448.

In *American Oil Company* v. *Neill*, 380 U.S. 451 (1965), the Court considered whether a per gallon excise tax imposed by Idaho was applicable to fuel delivered to the purchaser outside the state and thereafter transported to Idaho for use. The taxpayer was a licensed dealer in Idaho and carried on business activities in the state. The Court held that the activities surrounding the particular transaction the state sought to tax had to be examined to determine if the nexus required by constitutional due process was present. The Court observed that when a corporation enters a state and proceeds to do business there is a strong inference that the necessary "link" exists between the state and transactions which result in economic benefits from customers within the state. The Court nevertheless held that the imposition of the tax violated the due process clause, stating:

> The corporation can, however, exempt itself by a clear showing that there are no in-state activities connected with out-of-state sales. In such instances, the transactions are said to be "dissociated from the local business," 340 U.S. at 537, 95 L.Ed. at 521, and therefore may not, consistent with due process, be taxed. 380 U.S. at 458.

The "transaction" of the members of Waterways Association for which House Bill 1657 imposes the subject tax is the consumption of fuel (which may have been purchased outside the State of West Virginia) while traveling on the navigable waterways in, around and through West Virginia. This transaction is "dissociated from the local business" because the tax does not depend on any "local event" occurring prior to the imposition of the tax. The only "local event" in West Virginia is the consumption of fuel, which is an integral part of interstate transportation and indeed provides the motive power for such commerce. When the tax is imposed on traffic of Waterways Association members, it is a tax on an instrumentality totally in interstate commerce, without any "local event" to connect the transaction with the state. Under these circumstances, the tax must fail.

Numerous fuel tax cases have been considered by this Court involving Commerce Clause issues. Taxes have been sustained when the Court determined that the incidence of the tax was storing, selling, or withdrawing the fuel from storage—all local events. In *Nashville, Chattanooga & St. Louis Railway* v. *Wallace*, 288 U.S. 249 (1933), a Tennessee tax on the privilege of selling, storing, or distributing gasoline was sustained against a challenge that the gasoline which the taxpayer brought into the state was used in its business as an interstate carrier and the tax, therefore, constituted an unconstitutional burden on interstate commerce. The Court held that the gasoline was taxable because it had come to rest within the state (in storage), notwithstanding its prospective use as an instrument of interstate commerce.

The same result was reached in *Eastern Air Transport, Inc.* v. *South Carolina Tax Commission*, 285 U.S. 147 (1932), where the incidence of the tax was the sale of gasoline within the state, and in *Edelman* v. *Boeing Air Transport, Inc.*, 289 U.S. 249 (1933), where the tax applied upon withdrawal of fuel from storage. The Court reasoned in each case that the event giving rise to the tax, whether storage, sale or withdrawal from storage, was completed either after the interstate journey had ended or before use in interstate commerce began. The Court thus found a completed local event to which the tax attached and thus interstate commerce to which the fuel may have been subsequently dedicated was not the incidence of taxation. In each of the foregoing cases the Court recognized the distinction between the incident of taxation tied to a local event such as storage and a tax, such as the one at issue in this case, that is directly upon the consumption of fuel in interstate commerce which does not involve any such local event. The Court in *Helson* v. *Kentucky*, 279 U.S. 245 (1929) and *Bingaman* v. *Golden Eagle Western Lines*, 297 U.S. 626 (1936) makes the distinction clear.

In *Bingaman*, the Court held that an excise tax upon the use of motor fuel purchased in, and brought from, another

state and used only in an interstate bus transportation business was invalid as imposing a direct burden on an instrumentality of interstate commerce. The state argued that the tax was compensation for use of its highways, but the New Mexico Supreme Court had previously reviewed the statute and found it to be a general excise tax on the use of all gasoline in the state; and even though the proceeds of the tax were devoted to the building and improvement of state highways, the Court found that this did not alter the fact that the tax was not enacted for the privilege of using the highways.

Helson and *Bingaman* cannot be distinguished from the instant case. The tax imposed by West Virginia Code § 11-15A-13 is a general excise tax on the use and consumption of fuel in West Virginia. The incidence of taxation is consumption of fuel while using an instrumentality of interstate commerce, i.e., the Ohio River. West Virginia has utilized its position to impose a tax on captive users of a vital navigable waterway, which tax is nothing more than an exaction for the "privilege of using an instrumenatlity of interstate commerce" which is unequivocably prohibited by *Helson*.

Helson was reaffirmed by the Court in *United Airlines* v. *Mahin*, 410 U.S. 623 (1973). Although upholding a use tax on fuel stored at an airport and loaded onto airplanes for travel in interstate commerce, the Court nonetheless recognized that "fuel cannot be taxed by . . . the State in which it is merely consumed." 410 U.S. at 630. The Court utilized a "local event" analysis to sustain the Illinois tax.

> Multiple taxation and tax windfalls are avoided because only one State — the State of storage before loading — has a local event under which a tax is imposed. Under *Helson*, States over which the planes fly will be unable to impose a tax on mere consumption. 410 U.S. at 631.

The tax at issue here cannot escape this prohibition. By its terms, the tax is applicable to all traffic on the navigable

waterways, even though it may be totally interstate in character. It is a tax on the "mere consumption" of fuel in interstate commerce, which is specifically prohibited by *Helson*, *Bingaman* and *United Air Lines* as an undue burden on interstate commerce in violation of Article I, Section 8, Clause 3 of the United States Constitution. If every state through which barge traffic passed on a trip from Pittsburgh to New Orleans sought to reap the benefits of a windfall tax similar to West Virginia's fuel use tax, the cumulative burden on interstate commerce would be confiscatory and would indeed destroy a vital federal program of maintaining a viable inland waterway system, a result the Commerce Clause is designed to prevent.

B. THE TAX ASSESSED IS NOT FAIRLY RELATED TO SERVICES RENDERED BY THE STATE.

The fourth part of the Complete Auto test is that the tax must be fairly related to the services provided by the state.

In *Evansville-Vanderburgh Airport Authority* v. *Delta Airlines, Inc.*, 405 U.S. 707 (1972), the Court addressed the constitutionality of statutes that imposed a fee upon the enplaning of certain passengers at an airport. The funds collected were to be used to help defray the costs of airport maintenance and construction. In sustaining the tax, the Court set forth the following test:

> (W)hile state or local tolls must reflect a "uniform, fair, and practical standard" relating to public expenditures, it is the amount of the tax, not its formula, that is of central concern. At least so long as the toll is based on some fair approximation of use or privilege for use . . ., and is neither discriminatory against interstate commerce nor excessive in comparison with the governmental benefit conferred, it will pass constitutional muster, even though some other formula might reflect more exactly the relative use of the state facilities by individual users. 405 U.S. at 716-717.

Although decided prior to *Complete Auto*, the Court applied both the discrimination and "fairly related" element of that test. The Court reasoned that because both interstate and intrastate passengers were subject to the tax, there was no discrimination present. 405 U.S. at 717. The Court further held that the "charges reflect a fair, if imperfect, approximation of the use of facilities for whose benefit they are imposed," *Id.*

The test formulated in *Delta Airlines* shows conclusively that the tax imposed by West Virginia Code § 11-15A-13 is an impermissible burden on interstate commerce. Although the statute satisfies the first part of the test because it is equally

applicable to interstate as well as intrastate traffic, the statute fails to comply with the "fairly related" test for two reasons. First, the revenue generated by the statute does not represent a fair value of facilities maintained for the use and benefit of the taxpayer. The taxes collected from the members of Waterways Association under West Virginia Code § 11-15A-13 for their consumption of fuel on the navigable waterways are designated for the construction, repair and maintenance of West Virginia *highways*. The members of the Association do not use the highways in their business of water transportation by barge. In those instances where goods or employees are transported to or from barge loading points, fuel use tax is paid on the fuel consumed in that separate transportation.

Waterways Association members are taxed on the consumption of fuel purchased in another state and consumed while traveling through the State of West Virginia on the navigable waterways of the United States. The waterways which are within the exclusive jurisdiction of the federal government are regulated, constructed, operated, and maintained by the federal government. The members are required to fund a project from which they do not benefit, which is expressly prohibited by the test set forth in *Delta Airlines*.

The second reason the "fairly related" test is not met is that the tax paid by the Waterways Association members is excessive in relation to the costs incurred by the taxing authority. Navigable waterways are maintained by the Federal government. The State of West Virginia incurs no expense for the maintenance of the navigable waterways.

"The Court has continued to scrutinize taxes on interstate commerce that are designed to reimburse the State for the particular costs imposed by that commerce." *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 647, n. 13, (1981) Blackmun, J., dissenting. In *Ingels* v. *Morf*, 300 U.S. 290 (1937), the Court addressed a challenge to a state statute that required the payment of a license fee for the movement over the highways of motor vehicles from without the state for purposes of sale. The Court held:

> To justify the exaction by a state of a money payment burdening interstate commerce, it must affirmatively appear that it is demanded as reimbursement for the expense of providing facilities, or of enforcing regulations of the commerce which are within its constitutional power. 300 U.S. at 294.

The Court overturned the statute at issue in *Ingels* because the state failed to show that the revenue was used to "meet the cost of the construction or mainenance of its highways." *Id.* at 295, or would have reimbursed the state for a service provided to the taxpayer.

The circumstances presented by House Bill 1657 are even more egregious than those present in *Ingels*. The fuel use tax found in West Virginia Code § 11-15A-13 is a single revenue purpose statute.

There is no evidence that traffic on the navigable waterways has any impact on the highways of West Virginia. For example, the law requires a barge line (or vessel) traveling from Pittsburgh to New Orleans to pay to the State of West Virginia a tax for the privilege of passing through the state measured by the fuel that it consumes while traveling the Ohio River within the state or along its borders even though that barge line may never stop in West Virginia and the company operating the barge line may have no connection with West Virginia other than traveling on the Ohio River.

A tax which exacts revenues from barge lines for travel in interstate commerce to maintain highways in West Virginia, when such carriers have no use for the roads and no other relationship to West Virginia, is an impermissible burden on interstate commerce. This tax is precisely that which the fairly related test forbids as it is a use tax having a special, limited purpose unrelated to river transportation.

III. THE TAX IMPOSED BY HOUSE BILL 1657 CONSTITUTES A DUTY OF TONNAGE, PROHIBITED BY ARTICLE I, SECTION 10, CLAUSE 3 OF THE UNITED STATES CONSTITUTION.

Article I, Section 10, Clause 3, of the United States Constitution provides that "no state shall, without the consent of Congress, lay any duty of tonnage." This explicit limitation on state power was enshrined in the Constitution to settle a dispute over whether such duties would be prohibited by the Commerce Clause. The debate originated at the Constitutional Convention on September 15, 1787, when Maryland delegates McHenry and Carrol, considering the unique needs of the Chesapeake Bay region, urged that "no state shall be restrained from laying duties of tonnage for the purposes of clearing harbors and erecting lighthouses." *Prudential Insurance Co.* v. *Benjamin*, 328 U.S. 419 (1946), fn. 17, *quoting* Farrand, *Records of the Constitutional Convention of 1787*, Volume 2, 625-626 (1937). Ultimately, however, Mr. Langdon prevailed with his argument that "the regulation of tonnage was an essential part of the regulation of trade, and the states ought to have nothing to do with it," *Id;* (see also *Clyde Mallory Lines* v. *Alabama*, 296 U.S. 261 (1935), at 265, n. 1), and the Convention chose to provide explicitly for a prohibition on state duties of tonnage.

The first case decided by the United States Supreme Court concerning the tonnage taxes was *State Tonnage Tax Cases*, 12 Wall. (U.S.) 204 (1870). The case dealt with an Alabama statute passed in 1866 levying a tax at the rate or $1.00 per ton on steamboats and other watercraft plying the navigable waters of the state. The Court found that if the states, without consent of Congress, taxed vessels as instruments of commerce, by a tonnage duty or indirectly by imposing the tax upon the master or crew, they assume a jurisdiction which they do not possess and which falls directly within the prohibition of the Constitution. Recognizing that well-settled law supports the proposition that commerce comprehends navigation and extends to every type of commercial inter-

course between the several states, the Court concluded that the tax was in fact a prohibited duty of tonnage because it was not applied unless the vessels were plying the navigable waters of Alabama.

In later cases, charges imposed against water transportation vessels have been upheld where the charge had some direct relationship to a facility or service supplied by the taxing authority. *Northern Line Packet Co.* v. *Keokuk*, 95 U.S. 80 (1877); *Clyde Mallory Lines.* In *Keokuk*, the Court describes the intent of the constitutional prohibition of a duty of tonnage as being "to protect the freedom of commerce, and nothing more."

In *Mallory*, the duty of tonnage prohibition was described as follows:

> Hence, the prohibition against tonnage duties has been deemed to embrace all taxes and duties regardless of their name or form, even though not measured by the tonnage of the vessel, which operate to impose a charge for the privilege of entering, trading in, or lying in a port . . . . 296 U.S. at 265-266.

A barge towboat cannot navigate in West Virginia waters without being subjected to the tax, because fuel is consumed in navigation and any consumption of fuel in the state is subject to the tax. West Virginia could accomplish the same thing by placing a toll booth at the upper and lower reaches of the Ohio River to collect tolls from interstate barge operators using a waterway maintained by the Federal Government as a highway of commerce.

The dispositive factors in each case addressed by the Supreme Court of the United States involving a duty of tonnage issue is the presence or absence of an identifiable "quid pro quo" for which the state is justified in demanding compensation. The method of computing a tax, "even though not measured by the tonnage of the vessel," *Id.*, does not determine its validity. *Southern S.S. Co.* v. *Portwardens*, 73 U.S.

31 (1867); *Parkersburg & O. R. Transportation Co.* v. *City of Parkersburg*, 107 U.S. 691 (1883); *Clyde Mallory Lines.*

Under these circumstances, three aspects of the Duty of Tonnage Clause should be emphasized.

First, the debates of the Constitutional Convention make it abundantly clear that state duties, even for such vital services as lighthouses and harbor clearing, were to be prohibited under the Constitution.

Second, where such fees were absolutely necessary to facilitate commerce, they could be imposed only "with the consent of Congress." The prohibition against state duties, together with the provision for the consent of congress, establishes a strong presumption against the validity of any state duties. Where there are obvious benefits conferred, such as wharfage, *Keokuk*, or the use of a lock and dam, *Huse* v. *Glover*, 119 U.S. 453 (1886), the Court may dispense with the requirement of congressional consent. But where the benefits alleged to justify the duty are speculative, and there is greater likelihood of interference with interstate commerce, the constitutional requirement of congressional approval should be strictly enforced. *Southern S.S. Co.; Cannon* v. *City of New Orleans*, 87 U.S. 577 (1874).

Third, every Tonnage Clause case decided in this Court is entirely consistent with the proposition that, where the benefits to water carriers are speculative, the conduct of the carriers themselves indicates whether the state services do indeed facilitate commerce, *provided* that the carriers have free choice in deciding whether or not to avail themselves of such state services. That is, if a vessel's master determines that a wharf or harbor has no value to him, he can pass it by, but if he chooses to use the facility, he cannot complain that the rates are excessive, *Parkersburg*.

In the instant case, vessels have no choice but to pay the tax imposed by West Virginia Code § 11-15A-13 or discontinue their use of this vital avenue of interstate commerce. The fuel use tax is imposed merely because the barges have to travel

the navigable waterways in West Virginia. This tax is prohibited under these circumstances as a Duty of Tonnage.

The rationale of the lower Court in holding that the tax is not a duty of tonnage is flawed, both factually and legally. The Court found that "the taxes exacted by the challenged statute are exactions which help defray the cost of services provided by the State, such as police and fire protection," in the face of a statutory mandate that the proceeds of the tax be dedicated solely to West Virginia's *highways*.

The State of West Virginia, positioned as it is on the Ohio River, a great artery of interstate commerce, has leveraged its location into a revenue generating tool, and in effect taxes interstate commerce for no reason but to raise revenue. This tax has precisely the result that is proscribed by the Constitution which prohibits duties of tonnage.

IV THE TAX IMPOSED BY HOUSE BILL 1657 IS PROHIBITED UNDER THE TERMS OF THE NORTHWEST ORDINANCE OF 1787 AND VIRGINIA COMPACT OF 1789

The Northwest Ordinance and the Virginia Compact requires that the tax be invalidated. These statutes provide in pertinent part:

The Northwest Ordinance

> (T)he navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other States that may be admitted into the confederacy, without any tax, impost or duty therefor.

The Virginia Compact

> (T)hat the use and navigation of the river Ohio, so far as the territory of the proposed state, or the territory which shall remain within the limits of this Commonwealth lies thereon, shall be free and common to the citizens of the United States, and the respective jurisdictions of this Commonwealth and of the proposed state on the river as aforesaid, shall be concurrent only with the states which may possess the opposite shores of the said river.

The language shows a clear intent to prohibit the State of West Virginia from collecting the fuel use tax from users of the Ohio River.

The Northwest Ordinance was enacted by the Confederate Congress on July 13, 1787, to provide "for the government of the territory of the United States northwest of the River Ohio," which later became the present States of Ohio, Michigan, Illinois, Indiana and Wisconsin. These lands

which had been subject to conflicting claims of Virginia, Massachusetts, Connecticut, and New York during the early 1780's ceded to the Congress. Virginia, for her part, resolved on January 2, 1781, to yield "all right, title, and claim . . . to the lands northwest of the Ohio River," *10 Hening 564*, subject to certain conditions annexed to the act of cession. See *Va. Rev. Code 1819, p. 39.* These conditions were not entirely satisfactory to the Congress which responded with an act dated September 13, 1783, stipulating the terms on which it would accept the cession of lands from Virginia. On December 20, 1783, the Virginia General Assembly accepted Congress' stipulated terms and authorized its delegates in Congress to convey Virginia's title in the northwest territory to the United States. *Id.* Ultimately, the Virginia delegates executed a deed of cession to the United States, dated March 1, 1784, conveying "all rights, title, and claim, of soil as well as of jurisdiction, which the said Commonwealth hath to the territory or tract of country within the limits of the Virginia Charter, situate lying, and being, to the northwest of the River Ohio." *11 Hening 571.*

After enacting two early ordinances for the temporary government of this Territory (April 23, 1784) and for the disposal of lands in the territory (May 20, 1785), Congress passed the Ordinance of 1787 (Northwest Ordinance) to create territorial government, to provide for the formation of three to five new states in that territory at a later date, and to declare certain "Articles of Compact, between the original States and the people and States in the said territory, [which were to] remain forever unalterable unless by common consent . . ." *Act of Confederate Congress, July 13, 1787, reprinted in Am. Jur. 2d Desk Book, Document 5.* Among these articles of compact, Article IV provides that "the Navigable waters leading into the Mississippi and the St. Lawrence, and the carrying places between the same, shall be common highways, and forever free as well to the inhabitants of said territory as to the citizens of the United States, . . . without any tax, impost, or duty therefore." Article V provided for the formation of new states, which were to

be admitted by its delegates into the Congress of the United States, on an *equal footing* with the original states in all respects whatever; and were to be at liberty to form a permanent constitution and State government: "*provided*, the constitution and government, to be formed, shall be . . . in conformity to the principals contained in these articles . . ." The Article V provision for the formation of three to five new states conflicted with one of the conditions expressed in Virginia's deed of cession; to correct the defect, Virginia specially ratified and confirmed Article V of the ordinance on December 30, 1788. Va. Rev. Code 1819, p. 41. Almost immediately after the Federal Constitution was ratified, Congress re-enacted the Northwest Ordinance, in all parts relevant here, on August 7, 1789. 1 Stat. 50.

The Virginia Compact was enacted by the General Assembly on December 18, 1789, to provide for "the erection of the District of Kentucky into an independent state." Va. Rev. Code 1819, p. 59. Congress consented on February 9, 1791, 1 Stat. 189, and Kentucky was admitted into the Union.

Section 11 of the Virginia Compact provides "that the use and navigation of the River Ohio, so far as the territory of the proposed state, or the territory which shall remain within the limits of this Commonwealth lies thereon, *shall be free and common to the citizens of the United States, and the respective jurisdiction of this Commonwealth and of the proposed state on the river as aforesaid, shall be concurrent only with the states which may possess the opposite shores of the said river.*" (Emphasis supplied.)

When West Virginia achieved statehood in 1863, the first Constitution of the State describes the jurisdiction over the bed, banks, and shores of the Ohio River as being that which was "heretofore reserved by, or vested in the State of Virginia, . . ." *West Virginia Constitution, Art. II, Section 1.* Therefore, any limitations or restrictions that were imposed upon Virginia by the Northwest Ordinance and the Virginia Compact were inherited by West Virginia. The State's

jurisdiction over rivers was later incorporated into W. Va. Code § 1-1-2 which provides:

> The jurisdiction of this State also extends over all the rivers which are boundary lines between this and any other state, to the opposite shore, *where there is no statute or compact to the contrary.* (Emphasis added.)

This statute was first enacted in 1868 and remains unchanged. The law clearly recognizes the fact that compacts dealing with rights to and jurisdiction over rivers are superior to unilateral action by West Virginia asserting its jurisdiction over waterways within its boundaries.

In *Economy Light and Power Company* v. *United States*, 256 U.S. 113 (1921), the Supreme Court discussed the provisions of the Northwest Ordinance:

> To the extent that it pertained to *internal affairs*, the Ordinance of 1787 — notwithstanding its contractual form — was no more than a regulation of territory belonging to the United States, and was superceded by the admission of the State of Illinois into the Union "on an equal footing with the original states in all respects whatever." . . . *But*, so far as it established *public rights of highway in navigable waters* capable of bearing commerce from state to state, it did not regulate internal affairs alone, and was no more capable of repeal by one of the states than any other regulations of interstate commerce enacted by the Congress; being analogous in this respect to legislation enacted under the exclusive power of Congress to regulate commerce with the Indian tribes. 256 U.S. at 120. (Emphasis added.)

Thus, under *Economy Light*, although the act of Congress in admitting a state is sufficient to repeal the provisions of the Northwest Ordinance pertaining to the states' *internal affairs*, where interstate commerce is involved, the Northwest Ordinance remains in full force to preempt certain state actions,

such as taxation based on navigation of waterways serving interstate commerce.

The provisions of the Northwest Ordinance that governed the internal affairs of the territory where superseded by admission to statehood when the territory finally was divided into separate states. It is equally clear, however, as stated by Justice Pitney in *Economy Light*, that those provisions of the ordinance that "established public rights of highway in navigable waters capable of bearing commerce from state to state were not superseded by statehood and retained the status and effect of regulations of interstate commerce enacted by the Congress." It is not clear why the West Virginia court did not recognize the full impact of the United States Supreme Court's decision in *Ecomony Light*, but a careful reading of that decision leaves no doubt about the Court's distinction between matters peculiarly within the jurisdiction of the states and those, such as interstate commerce, that are within the exclusive power of Congress. The former are not burdened by enactments affecting territories prior to statehood, but the latter are preserved following statehood unless changed by action of the Congress.

For the foregoing reasons, the provisions contained in the Northwest Ordinance and the Virginia Compact declaring the status of navigable waterways such as the Ohio River as common highways, forever free, remain valid and effective today. The effect of the West Virginia fuel use tax is to impose a toll or charge for the navigation of the free highways of commerce maintained by the federal government. The tax is a direct intrusion into an area over which congress has exclusive jurisdiction and is, therefore, invalid.

CONCLUSION

For the foregoing reasons this Court should note probable jurisdiction of this Appeal so that the substantial federal question raised can be given plenary consideration.

Respectfully Submitted,

Burgess L. Doan
Counsel for Appellant
1900 Carew Tower
Cincinnati, Ohio 45202
(513) 621-1506

G. Thomas Battle
Suite 1200 United Center
P.O. Box 273
Charleston, West Virginia 25321
(304) 344-4081

APPENDICES

TABLE OF CONTENTS

Appendix		Page
A	Notice of Appeal to the United States Supreme Court From the Circuit Court of Kanawha County, West Virginia	1a
B	Order of the Supreme Court of Appeals of West Virginia Dated February 3, 1987, Refusing Petition for Appeal	3a
C	Opinion and Final Order of the Circuit Court of Kanawha County, West Virginia Dated April 18, 1986	4a
D	Constitution and Statutes	17a
E	Enrolled Committee Substitute for Senate Bill No. 1	40a

APPENDIX A

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

No. _____

WATERWAYS ASSOCIATION OF PITTSBURGH,
Plaintiffs Below, Appellants,

v.

HERSCHEL ROSE, III, STATE TAX COMMISSIONER OF WEST VIRGINIA
Defendants Below, Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the Waterways Association of Pittsburgh, the appellant named above, hereby appeals to the Supreme Court of the United States from the final order of the Circuit Court of Kanawha County, West Virginia, entered in this proceeding on April 18, 1986.

A copy of this Notice will also be filed in the Supreme Court of Appeals of West Virginia, inasmuch as the record may remain with this court.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

/s/ BURGESS L. DOAN
WALKER, CHATFIELD & DOAN
1900 Carew Tower
Cincinnati, Ohio 45202
(513) 621-1506
Counsel for Appellants

Filed with the Clerk of the Circuit Court of Kanawha County, West Virginia and with the Clerk of the Supreme Court of Appeals of West Virginia on April 28, 1987.

AFFIDAVIT OF SERVICE

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, TO-WIT:

I hereby affirm and certify that service of the foregoing Notice of Appeal to the Supreme Court of the United States was made on the parties required to be served by hand-delivering a true copy thereof to Appellees' attorney, Jeffrey V. Van Gilder, Assistant Attorney General, to him at the Attorney General's Office, State Capitol, Room W-435, Charleston, West Virginia 25305, and to Cathy S. Gatson, Clerk of Circuit Court of Kanawha County, West Virginia, Kanawha County Judicial Annex, Virginia Street East, Charleston, West Virginia 25301, this 28th day of April, 1987.

/s/ G. THOMAS BATTLE

Taken, subscribed and sworn to before me a Notary Public in said county and state, this 28th day of April, 1987.

My Commission expires August 13, 1994.

/s/ LINDA J. ROSS
Notary Public, State of West Virginia

[NOTARY SEAL]

APPENDIX B

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County on the 3rd day of February, 1987, the following order was made and entered, to-wit:

Waterways Association of Pittsburgh, a Pennsylvania corporation

vs.

Herschel H. Rose, III, Tax Commissioner of West Virginia

On a former day, to-wit, December 19, 1986, came the petitioner, Waterways Association of Pittsburgh, by Spilman, Thomas, Battle & Klostermeyer, G. Thomas Battle, and David B. Thomas, its attorneys, and presented to the Court its petition praying for an appeal from a judgment of the Circuit Court of Kanawha County rendered on the 18th day of April, 1986, with the record therein accompanying the petition, which being seen and inspected by the Court the appeal prayed for is refused. Justices McHugh and Brotherton would grant.

A True Copy

Attest: /s/ ANCIL H. RAMEY
Clerk, Supreme Court of Appeals

APPENDIX C

CIVIL ACTION NO. 84-C-2814

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

WATERWAYS ASSOCIATION OF PITTSBURGH, a Pennsylvania Corporation,

Plaintiff,

v.

HERSCHEL H. ROSE III, Tax Commissioner of the State of West Virginia,

Defendant.

OPINION AND FINAL ORDER

(Filed April 18, 1986)

Plaintiff, Waterways Association of Pittsburgh, brought this action pursuant to the provisions of W. Va. Code § 55-13-1 *et. seq.*, and Rule 57 of the West Virginia Rules of Civil Procedure. Plaintiff asks this Court to declare the provisions of House Bill 1657, which amended Articles 15 and 15A of Chapter 11 of the West Virginia Code, to violate certain provisions of the Northwest Ordinance and the Virginia Compact, the West Virginia Constitution and the United States Constitution.

FACTS

The facts herein, as stipulated by the parties, are as follows:

1. Plaintiff is Waterways Association of Pittsburgh, a nonprofit membership association incorporated under the laws of the State of Pennsylvania.

2. Defendant, Herschel H. Rose III ("Rose" or "State

Tax Commissioner"), is the Tax Commissioner of the State of West Virginia, having been duly appointed to such office as required by the Constitution and laws of the State of West Virginia.

3. On February 18, 1983, the West Virginia Legislature passed House Bill 1657, amending Articles 15 and 15A of Chapter 11 of the West Virginia Code (hereinafter sometimes referred to as "House Bill 1657"). House Bill 1657 became effective April 1, 1983, and provides for imposition of a tax on the sale, use or consumption in West Virginia of gasoline or special fuel. (The parties stipulated that House Bill 1657 amended Articles 14 and 14A of Chapter 11 of the West Virginia Code, but no such amendments to Articles 14 and 14A could be found by this Court.)

4. West Virginia Code § 11-15A-13(a)(2) imposes an excise tax on the "use or consumption in this State of gasoline or special fuel purchased outside this State at the rate of 5% of the average wholesale price of such gasoline or special fuel," with a minimum price for purposes of computation of the tax fixed by the statute at 97 cents per gallon.

5. West Virginia Code § 11-15A-13(c)(1) delegates to the State Tax Commissioner the authority to "determine the average wholesale price of gasoline and special fuel for each annual period, on the basis of sales data gathered for the preceding period of the first day of July through the thirty-first day of October."

6. The average wholesale price of gasoline and special fuel determined by the State Tax Commissioner on the basis of sales data gathered for the period of July 1, 1984, through October 31, 1984, was below the minimum price of 97 cents per gallon prescribed by W. Va. Code § 11-15A-13(c).

7. West Virginia Code § 11-15-13(c)(2) provides that the "average wholesale price" shall mean the statewide average per gallon wholesale price "as determined by the Tax Commissioner from information furnished by distributors of gasoline and special fuel in this State or such other information regarding wholesale prices as the Tax Commissioner may gather, or a combination of such information . . . ."

8. West Virginia Code § 11-15A-13(d) states:

> (d) *Computation of Tax Due from Motor Carriers.* — Every person who operates or causes to be operated a motor carrier in this State shall pay the tax imposed by this section on the average wholesale price of all gallons of gasoline or special fuel used in the operation of any motor carrier within this State, under the following rules:
>
> (1) The total amount of gasoline or special fuel used in the operation of the motor carrier within this State shall be that proportion of the total amount of gasoline and special fuel used in any motor carrier's operations within and without this State, that the total number of miles traveled within this State bears to the total number of miles traveled within and without this State.
>
> (2) A motor carrier shall first determine the gross amount of tax due under this section on the average wholesale value, determined under subsection (c), of all gasoline and special fuel used in the operation of the motor carrier within this State during the preceding quarter, as if all gasoline and special fuel had been purchased outside this State.
>
> (3) Next, the taxpayer shall determine the total tax paid under article fifteen of this chapter on all gasoline and special fuel purchased in this State for use in the operation of the motor carrier.
>
> (4) The difference between (2) and (3) is the amount of tax due under this article when (2) is greater than (3), or the amount to be refunded or credited to the motor carrier when (3) is greater than (2), which refund or credit shall be allowed in the same manner and under the same conditions as a refund or credit is allowed for the tax imposed by article fourteen-A of this chapter.

9. West Virginia Code § 11-15-18(c)(6) defines "motor carrier" to include "any aircraft, barge or other watercraft or locomotive transporting passengers or freight in or through this State."

10. Some of plaintiff's members are motor carriers within the meaning of West Virginia Code § 11-15-18(c)(6) and are in the business of transporting products by barge and other watercraft in interstate commerce on those parts of the Ohio River that are in the State of West Virginia, on other navigable rivers of the State, and on the Ohio River and other navigable rivers outside West Virginia.

11. Plaintiff's members that transport products by barge on the navigable rivers of West Virginia conduct one-point traffic, two-point traffic and/or pass-through traffic in West Virginia.

12. The following terms have the meaning specified for each:

a. One-point traffic — transporting goods from a point in West Virginia to a point in another state or transporting goods from another state to a point in West Virginia.

b. Two-point traffic — transporting goods from a point in West Virginia to another point in West Virginia.

c. Pass-through traffic — transporting goods from a point outside West Virginia, through West Virginia waters, to another point outside West Virginia.

d. West Virginia waters — navigable waterways within the boundaries of West Virginia.

e. West Virginia mileage — distance traveled by barge in navigable waters within the boundaries of West Virginia.

f. System mileage — distance traveled by barge in navigable waters both within and without the boundaries of West Virginia.

13. Some of plaintiff's members have only pass-through traffic and one-point traffic in West Virginia and have no two-point traffic in West Virginia.

14. Some of plaintiff's members have pass-through traffick, one-point traffic and two-point traffic in West Virginia.

15. Some of plaintiff's members have as much as 70% of their West Virginia mileage as pass-through traffic.

16. Some of plaintiff's members have 100% of their West Virginia mileage on the Ohio River.

17. Some of plaintiff's members have West Virginia mileage on the Ohio, Kanawha, Big Sandy and Monongahela Rivers.

18. The United States Government has sole responsibility for the regulation, servicing and maintenance of the navigable waterways, of which the Ohio, Kanawha, Big Sandy and Monongahela Rivers are a part. Article 1, Section 8 and Article 3, Section 2, Constitution of the United States; Title 33 U.S.C. § 1; Title 49 U.S.C. § 1 *et. seq.*

19. The sole means of power for navigation for barge transportation performed by plaintiff's members in West Virginia waters is gasoline or special fuel as defined in W. Va. Code § 11-15-18(9).

20. The amount of fuel used and consumed by boats operating barge traffic in West Virginia Waters increases as the size and weight of the boat increases.

21. The State Tax Commissioner requires the tax imposed by W. Va. Code § 11-15A-13(a) to be paid with respect to all gasoline and special fuel used and consumed by barge transportation operating in West Virginia waters.

22. The boundary of West Virginia along the Ohio River was established as the low water mark of the river on the west bank in 1787 by the Northwest Ordinance.

23. The establishment of locks and dams on the Ohio River system has caused the low water mark on the west bank of the river to rise and consequently at certain locations on the Ohio River along the West Virginia boundary, barge transportation may navigate west of the original low water mark in Ohio waters.

24. Certain of plaintiff's members operating in West Virginia have filed returns required under the provisions of House Bill 1657 and paid tax on fuel purchased outside West Virginia and used in their river transportation business in West Virginia. Other of the plaintiff's members do not engage in river transportation business in West Virginia, and have not paid tax under the provisions of House Bill 1657.

25. The State Tax Commissioner is empowered by House Bill 1657 and by the provisions of Chapter 11 of the West Virginia Code to administer and enforce the tax imposed by said legislation.

26. None of the plaintiff's members has ever sought to apply any credit as may be available under the provisions of Code 11-10A-8(a) against the tax imposed by W. Va. Code § 11-15A-13.

27. As a result of House Bill 1657 codified as W. Va. Code § 11-15A-13(a)(2), the State collects from watercraft approximately $250,000.00 per quarter year for a total of approximately one million dollars per year. Collections from railroad carriers total approximately 2 million dollars per year. Collections from motor trucks total approximately 6 million dollars per year.

I.

Plaintiff's first argument is that W. Va. Code § 11-15A-13, as applied to its members, violates the Northwest Ordinance of 1787, reenacted after ratification of the United States Constitution on August 7, 1789. Chap. 8, 1 Stat. at L. 50. The Northwest Ordinance provides, in part:

> (T)he navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other States that may be admitted into the confederacy, without any tax, impost or duty therefore.

The Virginia Compact, Va. Rev. Code 1819, p. 59 provided, in part:

> (T)hat the use and navigation of the river Ohio, so far as the territory of the proposed state, or the territory which shall remain within the limits of this Commonwealth lies thereon, shall be free and common to the

> citizens of the United States, and the respective jurisdictions of this Commonwealth and of the proposed state on the river as aforesaid, shall be concurrent only with the states which may possess the opposite shores of the said river.

Plaintiff argues that the language regarding the freedom of the subject navigable waters prevents West Virginia from collecting use tax on gasoline or special fuel consumed on rivers within the boundaries of West Virginia.

In *American Barge Line Co.* v. *Koontz*, 136 W. Va. 747, 68 S.E.2d 56 (1951), the West Virginia Supreme Court held that the Northwest Ordinance and Virginia Compact did not limit the sovereignty of West Virginia. The Court, citing *Economy Light & Power Co.* v. *United States*, 256 U.S. 113, 41 S.Ct. 409, 69 L. Ed 847 (1920), found that the power of the state is plenary unless and until Congress intervenes. Plaintiff argues that the West Virginia Supreme Court misinterpreted *Economy Light*. We disagree. We find that the use tax statute, as applied to Plaintiff's members, does not violate the Northwest Ordinance or the Virginia Compact. *See Streckfus Steamers* v. *Fox*, 14 F. Supp 312 (S.D. W. Va. 1936).

II.

Plaintiff's second argument is that W. Va. Code § 11-15A-13(c) constitute an unlawful delegation of power by the Legislature in violation of Article V, Section 1 of the Constitution of West Virginia to the Tax Commissioner, W. Va. Code § 11-15A-3(c) provides:

(c) Determination of average wholesale price.

(1) To simplify determining the average wholesale price of all gasoline and special fuels, the Tax Commissioner shall . . . determine the average wholesale price of gasoline and special fuel for each annual period, . . .

(2) The "average wholesale price" shall mean the single, state-wide average per gallon wholesale price, . . . as deter-

mined by the Tax Commissioner from information furnished by distributors of gasoline or special fuel in this State, or such other information regarding wholesale selling prices as the Tax Commissioner may gather, or a combination of such information: Provided, that in no event shall the average wholesale price be determined to be less than ninety-seven cents per gallon of gasoline or special fuel.

Plaintiff contends that Section 11-15A-13(c) does not provide adequate standards for the Tax Commissioner to determine the average wholesale price of gasoline or special fuel.

We are of the opinion that this section does not constitute an unlawful delegation of legislative power. The State Tax Commissioner is authorized to determine the average wholesale price of gasoline or special fuel. This is merely a factual determination: The total wholesale price paid for gasoline or special fuel divided by the total number of gallons sold equals the average wholesale price. This determination is a mathematical computation, a mere ministerial function.

If the Tax Commissioner had the authority to determine the total revenue to be raised by this tax or if he could set the rate of taxation, then the statute would constitute an unlawful delegation of the Legislature's authority. However, the tax rate is predetermined. W. Va. Code § 11-15A-2. Total revenue is determined by applying the rate to a value, which value is determined by a reasonable method of computation. This determination has limits, which do not make it an unlawful delegation of legislative power.

III.

Plaintiff contends that the use tax on gasoline and special fuel consumed in West Virginia, insofar as it pertains to its members, constitutes a "duty of tonnage" laid without consent of Congress, in violation of Article I, Section 10, Clause 3 of the United States Constitution. With reference to this clause of the Constitution, it has been stated:

(T)hat prohibition forbids a tax "upon the privilege of

> access by vessels or goods to the ports or territorial limits of a state," and applies to taxes and duties "which operate to impose a charge for the privilege of entering trading in, or lying in a port." (cites omitted) This is not that sort of tax.

Commonwealth v. *Baltimore Steam Packet Co.*, 193 Va. SS, ____, 68 S.E.2d 137, 140 (1951).

Commonwealth involved a Virginia license tax "for the privilege of doing business" which was based upon gross receipts. Va. Code § 58-575 (1950). If a tax on the privilege of doing business solely on the navigable waters of the State is not a duty of tonnage, then we are of the opinion that an excise tax on the use or consumption of personal property is not a duty of tonnage. *See also Union Barge Line* v. *Hardesty*, 282 S.E.2d 240 (1981); *American Barge Line* v. *Koontz*, 136 W. Va. 757, 68 S.E.2d 56 (1951); *American Barge Line* v. *Marcum*, 360 S.W.2d 134 (Ky. 1962).

Furthermore, the taxes exacted by the challenged statute are exactions which help defray the cost of services provided by the State, such as police and fire protection. *Union Barge Line, supra; Japan Line Ltd.* v. *County of Los Angeles*, 141 Cal. Rptr. 905, 571 P.2d 254 (1977); rather than charges for access to the navigable waters of the State.

Also persuasive is the fact that this tax applies to all "motor carriers" as defined in W. Va. Code § 11-15A-13(b), which incorporates the definition set forth in Section 11-15-18. This definition includes locomotives, aircraft and a variety of motor vehicles. It is apparent that these vehicles do not pay duties of tonnage.

Defendant also points out that the tax applies only to watercraft using gasoline or special fuel. Watercraft propelled by other means do not pay this tax. Were this tax a duty of tonnage, we believe it would apply to all watercraft having access to the navigable waters of the State, regardless of their means of propulsion.

IV.

Plaintiff's last contention is that the challenged statute violates Article 1, Section 8, Clause 3 of the Constitution of the United States, known as the Commerce Clause. More specifically, Plaintiff contends that these taxes do not comply with three of the four prongs of the test of *Complete Auto Transit Inc.* v. *Brady* 430 US 274 (1977).

Plaintiff contends that its members do not have substantial nexus with the State of West Virginia and that the tax is not fairly related to the services provided by the States. In *Union Barge Line* v. *Hardesty, supra,* involving a taxpayer engaged in essentially the same business as Plaintiff's members, the West Virginia found substantial nexus and benefits fairly related to the tax. *Union Barge Line* is controlling precedent.

Plaintiff also contends that the use tax discriminates against interstate commerce, because it allows a credit for sales tax paid in West Virginia, but doesn't allow a credit for sales tax paid to another State.

West Virginia Code § 11-10A-8 (repealed July 1, 1985) provides, in part:

> (a) *Use Tax Credit.* —
>
> Each purchaser liable for a use tax on tangible personal property shall be entitled to full credit for the combined amount or amounts of legally imposed sales or use taxes paid by him with respect to the same property to another state and any subdivision thereof. The credit shall be applied first against the amount of any use tax due the state, . . .

Thus, between the effective date of House Bill 1657 and the date of the repeal of W. Va. Code § 11-10A-8, Plaintiff's argument is totally without basis.

After July 1, 1985, there is no credit available to Plaintiff's members, or other motor carriers, who purchase gasoline or special fuel in another State, pay sales tax thereon, and then use the same gasoline or special fuel in West Virginia. Without such a credit, motor carriers are discriminated

against *solely* because they purchase gasoline or special fuel *in another State*. This discriminates against interstate commerce and, therefore, violates the Commerce Clause as interpreted by the United States Supreme Court in *Complete Auto Transit, supra.*

Assuming that a motor carrier purchases special fuel in West Virginia, it pays a 5% sales tax. If it uses the fuel in West Virginia, it pays no additional tax. The same carrier could purchase fuel in another state and pay a 5% sales tax. If the carrier uses the same fuel in West Virginia, it pays a 5% use tax. Because the carrier purchases fuel in another state to use in West Virginia, it shoulders a higher tax burden. This favors West Virginia commerce over interstate commerce.

Both parties cite *Henneford* v. *Silas Mason Co.*, 300 US 577, 81 L.Ed. 814, (1936), in support of their positions. Defendant cites language which indicates that a credit for taxes paid to another state is not a prerequisite to the validity of a use tax. The Court explicitly declined to decide the issue. *Id.*, at 587, 81 L.Ed. at 821.

We believe the Court's later analysis of *Silas Mason* represents the actual spirit of the discrimination test. *Halliburton Oil Well Cementing Co.*, 373 U.S. 64, 10 L.Ed.2d 202 (1963). There the Court stated:

> "Equality is the theme that runs through all the sections of the statute. . . . No one who uses property in Washington after buying it at retail is to be exempt from a tax upon the privilege of enjoyment except to the extent that he has paid a use or sales tax somewhere." The use tax is "upon one activity or incident," and the sales tax is "upon another, but the sum is the same when the reckoning is closed." . . . 300 U.S., at 583, 584.

The conclusion is inescapable: equal treatment for in-state and out-of-state taxpayers similarly situated is the condition precedent for a valid use tax on goods imported from out-of-state.

The inequality of the Louisiana tax burden between in-state and out-of-state manufacturer-users is admitted. Although the rate is the same, the appellant's tax base is increased through the inclusion of its product's labor and shop overhead. The Louisiana Supreme Court characterized this discrepancy as incidental. However, equality for the purposes of competition and the flow of commerce is measured in dollars and cents, not legal abstractions. (footnote omitted) *Id.* at 70, 10 L.Ed.2d at 207. As in *Halliburton*, we are confronted with a situation where the rate of taxation is equal, but the tax burden on those engaged in interstate commerce is different when measured in dollars and cents. As in *Halliburton*, we find the tax to be discriminatory under the Commerce Clause.

FINAL ORDER

In accordance with the opinion rendered in this case, this Court does hereby DECLARE:

1. That West Virginia Code § 11-15-18 is constitutional and valid in every respect; that it is not violative of the Northwest Ordinance; that it is not an unlawful delegation of legislative authority under Article V, Section I of the Constitution of West Virginia; that it is not a duty of tonnage, pursuant to Article I, Section 10, Clause 3 of the United States Constitution; and that it does not violate the Commerce Clause, Article I, Section 8, Clause 3 of the Constitution of the United States.

2. West Virginia Code § 11-15A-13 is constitutional and valid in every respect between the date of its enactment and June 30, 1985, inclusive the last day that W. Va. Code § 11-10A-1 *et seq.* was in effect, for the same reasons that W. Va. Code § 11-15-18 is constitutional and valid.

3. West Virginia Code § 11-15A-13 is unconstitutional and without effect after June 30, 1985, as it discriminates against interstate commerce and, therefore, violates Article I, Section 8, Clause 3 of the United States Constitution.

This Court does hereby ORDER and ADJUDGE:

1. That no remedy is available to Plaintiff for the period April 1, 1983, through June 30, 1985, inclusive.

2. That Defendant shall refund to Plaintiff's members all use taxes collected after July 1, 1985, pursuant to West Virginia Code § 11-15A-13.

3. That Defendant shall refrain from collecting or attempting to collect any use taxes which might otherwise be due and owing under W. Va. Code § 11-15A-13.

The Court does hereby FURTHER ORDER that a certified copy of this Final Order be sent to all parties or counsel of record. The Court notes the objection and exception of the party or parties aggrieved by this Final Order.

ENTER: /s/ JUDGE MARGARET L. WORKMAN

DATE: April 18, 1986

APPENDIX D

CONSTITUTION AND STATUTES

A. *United States Constitution and Code:*

1. Article I, Section 8, Clause 3 (the Commerce Clause)

The Congress shall have Power . . . to regulate Commerce with Foreign Nations, and among the several States and with the Indian Tribes;

2. Article I, Section 10, Clause 3 (the Duty of Tonnage Clause)

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

3. Article VI, Clause 2 (the Supremacy Clause)

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

4. Amendment XIV, Section 1, Clause 4

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State where they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

5. U.S. Code

a. 26 U.S.C.

§ 4042. Tax on fuel used in commercial transportation on inland waterways [effective 10/1/80].

(a) In general. There is hereby imposed a tax on any liquid used during any calendar quarter by any person as a fuel in a vessel in commercial waterway transportation.

(b) Amount of tax. The tax imposed by subsection (a) shall be determined from the following table:

If the use occurs—	The tax is—
After September 30, 1980 and before October 1, 1981	4 cents a gallon
After September 30, 1981 and before October 1, 1983	6 cents a gallon
After September 30, 1983 and before October 1, 1985	8 cents a gallon
After September 30, 1985	10 cents a gallon

(c) Exemptions.

(1) Deep-draft ocean-going vessels. The tax imposed by subsection (a) shall not apply with respect to any vessel designed primarily for use on the high seas which has a draft of more than 12 feet.

(2) Passenger vessels. The tax imposed by subsection (a) shall not apply with respect to any vessel used primarily for the transportation of persons.

(3) Use by state or local government in transporting property in a state or local business. Subparagraph (B) of subsection (d)(1) shall not apply with respect to use by a State or political subdivision thereof.

(4) Use in moving lash and seabee ocean-going barges. The tax imposed by subsection (a) shall not apply with respect

to use for movement by tug of exclusively LASH (Lighter-aboard-ship) and SEABEE ocean-going barges released by their ocean-going carriers solely to pick up or deliver international cargoes.

(d) Definitions. For purposes of this section—

(1) Commercial waterway transportation. The term "commercial waterway transportation" means any use of a vessel on any inland or intracoastal waterway of the United States—

(A) in the business of transporting property for compensation or hire, or

(B) in transporting property in the business of the owner, lessee, or operator of the vessel (other than fish or other aquatic animal life caught on the voyage).

(2) Inland or intracoastal waterway of the United States. The term "inland or intracoastal waterway of the United States" means any inland or intracoastal waterway of the United States which is described in section 206 of the Inland Waterways Revenue Act of 1978 [33 USCS § 1804].

(3) Person. The term "person" includes the United States, a State, a political subdivision of a State, or any agency or instrumentality of any of the foregoing.

(e) Date for filing return. The date for filing the return of the tax imposed by this section for any calendar quarter shall be the last day of the first month following such quarter.

(Added Oct. 21, 1978, P.L. 95-502, Title II, § 202(a), 92 Stat. 1696.)

b. 28 USC

§ 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validy.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

For the purposes of this section the term "highest court of a State" includes the District of Columbia Court of Appeals.

(June 25, 1948, c. 646, § 1, 62 Stat. 929; July 29, 1970, P.L. 91-358, Title I, Part D, Subpart 2, § 172(a)(1), 84 Stat. 590.)

c. 33 U.S.C.

§ 1801. Establishment of Inland Waterways Trust Fund

(a) Creation of trust fund. There is established in the treasury of the United States a trust fund to be known as the "Inland Waterways Trust Fund" (hereinafter in this title referred to as the "Trust Fund"), consisting of such amounts as may be appropriated or credited to the Trust Fund as provided in this section.

(b) Transfer to trust of amounts equivalent to certain taxes.
(1) In general. There are hereby appropriated to the Trust Fund amounts determined by the Secretary of the Treasury (hereinafter in this sectio referred to as the "Secretary") to be equivalent to the amounts of the taxes received in the Treasury under section 4042 of the Internal Revenue Code

of 1954 [26 USCS § 4042] (relating to tax on fuel used in commercial transportation on inland waterways).

(2) Method of transfer. The amounts appropriated by paragraph (1) shall be transferred at least quarterly from the general fund of the Treasury to the Trust Fund on the basis of estimates made by the Secretary of the amounts referred to in paragraph (1) received in the Treasury. Proper adjustments shall be made in the amounts subsequently transferred to the extent prior estimates were in excess of or less than the amounts required to be transferred.

(c) **Management of trust fund.** (1) Report. It shall be the duty of the Secretary to hold the Trust Fund, and to report to the Congress each year ending on or after September 30, 1981, on the financial condition and the results of the operations of the Trust Fund during the preceding fiscal year and on its expected condition and operations during the fiscal year and the next 5 fiscal years after the fiscal year. Such report shall be printed as a house document of the session of the Congress to which the report is made.

(2) Investment. (A) In general. It shall be the duty of the Secretary to invest such portion of the Trust Fund as is not, in his judgment, required to meet current withdrawals. Such investments may be made only in interest-bearing obligations of the United States. For such purpose, such obligations may be acquired (i) on original issue at the issue price, or (ii) by purchase of outstanding obligations at the market price.

(B) Sale of obligations. Any obligation acquired by the Trust Fund may be sold by the Secretary at the market price.

(C) Interest; proceeds from sales and redemptions. The interest on, and the proceeds from the sale or redemption of, any obligations held in the Trust Fund shall be credited to and from a part of the Trust Fund.

(Oct. 21, 1978, P. L. 95-502, Title II, § 203, 92 Stat. 1697.)

§ 1802. Trust Fund available for expenditures for navigation construction and rehabilitation projects on inland waterways

(a) In general. Amounts in the Trust Fund shall be available, as provided by appropriations Acts, for making construction and rehabilitation expenditures for navigation on the inland and intracoastal waterways of the United States described in section 206 of this Act [33 USCS § 1804]. No amount may be appropriated out of the Trust Fund unless the law authorizing the expenditure for which the amount is appropriated explicitly provides that the appropriation is to be made out of the Trust Fund.

(b) Expenditures must be otherwise authorized by law. Nothing in this section shall be deemed to authorize any program, project, or other activity not otherwise authorized by law.

(Oct. 21, 1978, P. L. 95-502, Title II, § 204, 92 Stat. 1698.)

§ 1803. Study with respect to inland waterway user taxes and charges

(a) Study directed. The Secretary of Transportation and the Secretary of Commerce, in consultation with the Secretary of the Treasury, the Secretary of Agriculture, the Secretary of Energy, the Attorney General of the United States, the Secretary of the Army, the Chairman of the Water Resources Council, and the Director of the Office of Management and Budget, shall—

(1) make a full and complete study with respect to inland waterway user taxes and charges, and

(2) make findings and policy recommendations with respect thereto.

Such study shall include (but shall not be limited to) a consideration of the matters listed in subsections (b), (c), (d), (e), and (f) of this section.

(b) Considerations relating to the taxing mechanism. (1) The extent to which the Federal Government should seek to recover some or all of Federal expenditures for the benefit of inland waterway transportation from the users of the facilities for which such expenditures are made.

(2) The various forms of inland waterway user taxes and charges which could be established.

(3) The various methods of collecting inland waterway user taxes and charges, and the administrative costs of such taxes and charges.

(4) The classes and categories of users and other persons on whom inland waterway user taxes and charges should be imposed.

(5) The waterways of the United States (including the Great Lakes, deep draft channels, and coastal ports) which should be included in any system of user taxes and charges, together with the economic effects of such taxes and charges.

(6) The use of revenues derived from inland waterway user taxes and charges, including consideration of changes in, or alternatives to, the Trust Fund mechanism.

(c) Considerations relating to economic effects. The economic effects of waterway user taxes and charges on—

(1) Carriers and users. On—

(A) carriers and shippers using the inland waterways, and

(B) users (including ultimate consumers) of commodities which are transported on the inland waterways.

(2) Regions, etc. On—

(A) existing investment in industrial plants, agricultural interests, and commercial enterprises, and on related

employment, in regions of the country served by inland water transportation directly or in combination with other modes, and

(B) future economic growth prospects in such regions, including anticipated shifts of industry and employment to other areas together with an evaluation of effects on regional economies and their development, including consistency with Federal policies as set forth in other legislation.

(3) Small business and industrial concentration and competition. On—

(A) small business enterprise, and

(B) industrial concentration and competition, both within the transportation industry and in any line of commerce (within the meaning of the antitrust laws).

(4) Competitors. On the freight rates charged by other modes of transportation and the extent of short-term and long-term diversion of traffic from the inland waterways to such other modes. In considering such diversion of traffic, there shall also be considered the effects of such diversion on—

(A) the development of alternative sources of supply and on alternative modes of transportation and alternative routing to market,

(B) the comparative safety of the handling and transportation of hazardous materials, and

(C) the comparative energy efficiency of the modes and routes of the transportation involved.

(5) Prices. On prices of commodities shipped by inland waterways and by competing modes, including the costs of energy materials and the effects on electric power rates.

(6) Balance of payments. On the balance of payments of the United States based on our international trade.

(d) Considerations relating to economic feasibility of waterway improvement projects; level of benefits from waterway expenditures. (1) The effects of inland waterway user taxes and charges on the economic feasibility of inland waterway improvement projects.

(2) The comparative levels of benefits received from Federal expenditures on inland waterways for—

(A) commercial uses, and

(B) other uses, including (but not limited to) recreation, reclamation, water supply, low-flow augmentation, fish and wildlife enhancement, hydroelectric power, flood control, and irrigation uses.

(e) Considerations relating to Federal assistance. (1) The extent of past, present, and expected future Federal assistance to the several modes of freight transportation. Such consideration shall include an evaluation and comparison of the public benefits resulting from such assistance to each of the several transportation modes in terms of adequacy, efficiency, and economy of service, safety, technological progress, and energy conservation. The Federal assistance considered under this paragraph shall include all forms of such assistance, such as tax advantages, direct grants, rate adjustments for improvement purposes, assumption of pension fund liabilities, loans, guarantees, capital participation, revenues from land grants, and provision of right-of-way operation, maintenance, and improvement.

(2) The competitive effects of past, present, and expected future Federal expenditures on inland waterways on competitive modes of transportation.

(3) The need for Federal assistance to agricultural, industrial, and other interests affected by inland waterway user taxes and charges.

(f) Considerations relating to policy and future development. The effects of inland waterway user taxes and charges on—

(1) The achievement of the objectives of the National Transportation Policy as set forth in the preamble to the Transportation Act of 1940.

(2) The expansion and improvement of the inland waterways determined to be necessary by the Secretary of the Army under section 158 of the Water Resources Development Act of 1976 (Public Law 94-587) [33 USCS § 540 note] or estimated to be necessary under paragraph (3).

(3) The requirements of the Nation through the year 2000 for transportation service, the portion thereof which should be provided by inland waterway carriers and an estimate of the expansion and improvement of inland waterways capacity necessary to meet such requirements.

(g) "Inland waterway user taxes and charges" defined. For purposes of this section, the term "inland waterway user taxes and charges" means taxes imposed on the use of the inland and intracoastal waterways of the United States and all alternatives to such taxes.

(h) Report. Not later than September 30, 1981, the Secretary of Transportation shall transmit to Congress a final report of the study required by this section, together with his findings and recommendations (including necessary legislation) and the findings and recommendations of the Secretary of Commerce, the Secretary of Treasury, the Secretary of Agriculture, the Secretary of Energy, the Attorney General of the United States, the Secretary of the Army, the Chairman of the Water Resources Council, and the Director of the Office of Management and Budget.

(i) Authorization of appropriations. There are hereby authorized to be appropriated from time to time to the Secretary of Transportation such sums, not to exceed

$8,000,000 in the aggregate, as may be necessary to carry out the study required by this section.

(Oct. 21, 1978, P. L. 95-502, Title II, § 205, 92 Stat. 1698.)

§ 1804. Inland and intracoastal waterways of the United States

For purposes of section 4042 of the Internal Revenue Code of 1954 [26 USCS § 4042] (relating to tax on fuel used in commercial transportation on inland waterways) and for purposes of section 204 of this Act [33 USCS § 1802], the following inland and intracoastal waterways of the United States are described in this section:

(1) Alabama-Coosa Rivers: From junction with the Tombigbee River at river mile (hereinafter referred to as RM) 0 to junction with Coosa River at RM 314.

(2) Allegheny River: From confluence with the Monongahela River to form the Ohio River at RM 0 to the head of the existing project at East Brady, Pennsylvania, RM 72.

(3) Apalachicola-Chattahoochee and Flint Rivers: Apalachicola River from mouth at Apalachicola Bay (intersection with the Gulf Intracoastal Waterway) RM 0 to junction with Chattachoochee [Chattahoochee] and Flint Rivers at RM 107.8. Chattachoochee [Chattahoochee] River from junction with Apalachicola and Flint Rivers at RM 0 to Columbus, Georgia, at RM 155 and Flint River, from junction with Apalachicola and Chattahoochee Rivers at RM 0 to Bainbridge, Georgia, at RM 28.

(4) Arkansas River (McClellan-Kerr Arkansas River Navigation System): From junction with Mississippi River at RM 0 to port of Catoosa, Oklahoma, at RM 448.2.

(5) Atchafalaya River: From RM 0 at its intersection with the Gulf Intracoastal Waterway at Morgan City, Louisiana, upstream to junction with Red River at RM 116.8.

(6) Atlantic Intracoastal Waterway: Two inland water routes approximately paralleling with Atlantic coast between Norfolk, Virginia, and Miami, Florida, for 1,192 miles via both Albermarle and Chesapeake Canal and Great Dismal Swamp Canal routes.

(7) Black Warrior-Tombigbee-Mobile Rivers: Black Warrior River System from RM 2.9, Mobile River (at Chickasaw Creek) to confluence with Tombigbee River at RM 45. Tombigbee River (to Demopolis at RM 215.4) to port of Birmingham, RM's 374-411 and upstream to head of navigation on Mulberry Fork (RM 429.6), Locust Fork (RM 407.8), and Sipsey Fork (RM 430.4).

(8) Columbia River (Columbia-Snake Rivers Inland Waterways): From The Dalles at RM 191.5 to Pasco, Washington (McNary Pool), at RM 330, Snake River from RM 0 at the mouth to RM 231.5 at Johnson Bar Landing, Idaho.

(9) Cumberland River: Junction with Ohio River at RM 0 to head of navigation, upstream to Carthage, Tennessee, at RM 313.5.

(10) Green and Barren Rivers: Green River from junction with the Ohio River at RM 0 to head of navigation at RM 149.1.

(11) Gulf Intracoastal Waterway: From St. Mark's River, Florida, to Brownsville, Texas, 1,134.5 miles.

(12) Illinois Waterway (Calumet-Sag Channel): From the junction of the Illinois River with the Mississippi River RM 0 to Chicago Harbor at Lake Michigan, approximately RM 350.

(13) Kanawha River: From junction with Ohio River at RM 0 to RM 90.6 at Deepwater, West Virginia.

(14) Kaskaskia River: From junction with the Mississippi River at RM 0 to RM 36.2 at Fayetteville, Illinois.

(15) Kentucky River: From junction with Ohio River at

RM 0 to confluence of Middle and North Forks at RM 258.6.

(16) Lower Mississippi River: From Baton Rouge, Louisiana, RM 233.9 to Cairo, Illinois, RM 953.8.

(17) Upper Mississippi River: From Cairo, Illinois, RM 953.8 to Minneapolis, Minnesota, RM 1,811.4.

(18) Missouri River: From junction with Mississippi River at RM 0 to Sioux City, Iowa, at RM 734.8.

(19) Monongahela River: From junction with Allegheny River to form the Ohio River at RM 0 to junction of the Tygart and West Fork Rivers, Fairmont, West Virginia, at RM 128.7.

(20) Ohio River: From junction with the Mississippi River at RM O to junction of the Allegheny and Monongahela Rivers at Pittsburgh, Pennsylvania, at RM 981.

(21) Ouachita-Black Rivers: From the mouth of the Black River at its junction with the Red River at RM 0 to RM 351 at Camden, Arkansas.

(22) Pearl River: From junction of West Pearl River with the Rigolets at RM 0 to Bogalusa, Louisiana, RM 58.

(23) Red River: From RM 0 to the mouth of the Cypress Bayou at RM 236.

(24) Tennessee River: From junction with Ohio River at RM 0 to confluence with Holstein and French Rivers at RM 652.

(25) White River: From RM 9.8 to RM 255 at Newport, Arkansas.

(26) Willamette River: From RM 21 upstream of Portland, Oregon, to Harrisburg, Oregon, at RM 194.

(Oct. 21, 1978, P. L. 95-502, Title II, § 206, 92 Stat. 1700.)

B. *The Northwest Ordinance of 1787*

ARTICLE IV

The said territory, and the States which may be formed therein, shall forever remain a part of this confederacy of the United States of America, subject to the Articles of Confederation, and to such alterations therein as shall be constitutionally made; and to all the acts and ordinances of the United States in Congress assembled, conformable thereto. The inhabitants and settlers in the said territory shall be subject to pay a part of the Federal debts, contracted, or to be contracted, and a proportional part of the expenses of government to be apportioned on them by Congress, according to the same conmmon rule and measure by which apportionments thereof shall be made on the other States; and the taxes for appying their proportion shall be laid and levied by the authority and direction of the legislatures of the district, or districts, or new States, as in the original States, within the time agreed upon by the United States in Congress assembled. The legislatures of those districts, or new States, shall never interfere with the primary disposal of the soil by the United States in Congress assembled, nor with any regulations Congress may find necessary for securing the title in such soil to the bonafide purchasers. No tax shall be imposed on lands the property of the United States; and in no case shall nonresident proprietors be taxed higher than residents. The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other States that may be admitted into the confederacy, without any tax, impost, or duty therefor.

C. *The Virginia Compact of 1789*

SECT. 11. Seventh, that the use and navigation of the river Ohio, so far as the territory of the proposed state, or the territory which shall remain within the limits of this Commonwealth lies thereon, shall be free and common to the

citizens of the United States, and the respective jurisdictions of this Commonwealth and of the proposed state on the river as aforesaid, shall be concurrent only with the states which may possess the opposite shores of the said river.

D. *West Virginia Code:*

a. § 11-15-13. Collection of tax when sale on credit.

A vendor doing business wholly or partially on a credit basis shall require the purchaser to pay the full amount of tax due upon a credit sale at the time such sale is made or within thirty days thereafter. (1937), c. 108; 1955, c. 169.)

b. § 11-15A-13. Tax on gasoline and special fuel.

(a) *Imposition of tax.*

(1) *On deliveries in this State.* — Gasoline or special fuel furnished or delivered within this State to consumers or users is subject to the tax rate imposed by section two [§ 11-15A-2] of this article: Provided, that the amount of tax due under section two shall in no event be less than five percent of the average wholesale price of gasoline, and with such price to, in no case, be deemed to be less than ninety-seven cents per gallon for all gallons of gasoline and special fuel taxable under section two [§ 11-15A-2] of this article.

(2) *On purchases out of State.* — An excise tax is hereby imposed on the use or consumption in this State of gasoline or special fuel purchased outside this State at the rate of five percent of the average wholesale price of such gasoline or special fuel, as determined under subsection (c), notwithstanding any provision of this article to the contrary: Provided, that gasoline or special fuel contained in the supply tank of a motor vehicle that is not a motor carrier shall not be taxable, except that gasoline or special fuel imported in the supply tank or auxiliary tank of construction equipment, mining equipment, track maintenance equipment or other similar equipment, shall be taxed in the same manner as that in the supply tank of a motor carrier.

(b) *Definitions.* — Terms used in the section shall have the same meaning as when used in a comparable context in section eighteen [§ 11-15-18], article fifteen of this chapter.

(c) *Determination of average wholesale price.*

(1) To simplify determining the average wholesale price of all gasoline and special fuel, the tax commissioner shall, effective with the period beginning the first day of the month of the effective date of this section [April 1, 1983] and each first day of January, annually, thereafter, determine the average wholesale price of gasoline and special fuel for each annual period, on the basis of sales data gathered for the preceding period of the first day of July through the thirty-first day of October. Notification of the average wholesale price of gasoline and special fuel shall be given by the tax commissioner at least thirty days in advance of each first day of January, annual period, by filing notice of the average wholesale price in the state register, and by such other means as the tax commissioner deems reasonable: Provided, that notice of the average wholesale price of gasoline and special fuel for the first period shall be timely given if filed in the state register on the effective date of this section [April 1, 1983].

(2) The "average wholesale price" shall mean the single, state-wide average per gallon wholesale price, rounded to the third decimal (thousandth of a cent), exclusive of state and federal excise taxes on each gallon of gasoline or diesel fuel, as determined by the tax commissioner from information furnished by distributors of gasoline or special fuel in this State, or such other information regarding wholesale selling prices as the tax commissioner may gather, or a combination of such information: Provided, that in no event shall the average wholesale price be determined to be less than ninety-seven cents per gallon of gasoline or special fuel.

(3) All actions of the tax commissioner in acquiring data necessary to establish and determine the average wholesale price of gasoline and special fuel, in providing notification of

his determination prior to the effective date of any change in rate, and in establishing and determining the average wholesale price of fuel, may be made by the tax commissioner without compliance with the provisions of article three [§ 29A-3-1 et seq.], chapter twenty-nine-A of this Code.

(4) In any administrative or court proceeding brought to challenge the average wholesale price of gasoline and special fuel as determined by the tax commissioner, his determination shall be presumed to be correct and shall not be set aside unless it is clearly erroneous.

(d) *Computation of tax due from motor carriers.* — Every person who operates or causes to be operated a motor carrier in this State shall pay the tax imposed by this section on the average wholesale price of all gallons of gasoline or special fuel used in the operation of any motor carrier within this State, under the following rules:

(1) The total amount of gasoline or special fuel used in the operation of the motor carrier within this State shall be that proportion of the total amount of gasoline and special fuel used in any motor carrier's operations within and without this State, that the total number of miles traveled within this State bears to the total number of miles traveled within and without this State.

(2) A motor carrier shall first determine the gross amount of tax due under this section on the average wholesale value, determined under subsection (c), of all gasoline and special fuel used in the operation of the motor carrier within this State during the preceding quarter, as if all gasoline and special fuel had been purchased outside this State.

(3) Next, the taxpayer shall determine the total tax paid under article fifteen [§ 11-15-1 et seq.] of this chapter on all gasoline and special fuel purchased in this State for use in the operation of the motor carrier.

(4) The difference between (2) and (3) is the amount of tax due under this article when (2) is greater than (3), or the

amount to be refunded or credited to the motor carrier when (3) is greater than (2), which refund or credit shall be allowed in the same manner and under the same conditions as a refund or credit is allowed for the tax imposed by article fourteen-A [§ 11-14A-1 et seq.] of this chapter.

(e) *Return and payment of tax.* — Tax due under this article on the use or consumption in this State of gasoline or special fuel shall be paid by each taxpayer on or before the twenty-fifth day of January, April, July and October of each year, notwithstanding any provision of this article to the contrary, by check, bank draft, certified check or money order, payable to the tax commissioner, for the amount of tax due for the preceding quarter. Every taxpayer shall make and filed with his remittance, a return showing such information as the tax commissioner may require.

(f) *Compliance.* — To facilitate ease of administration and compliance by taxpayers, the tax commissioner may require motor carriers liable for the taxes imposed by this article on the use of gasoline or special fuel in the operation of motor carriers within this State, and the tax imposed by article fourteen-A [§ 11-14A-1 et seq.] of this chapter on such gallons of fuel, to file a combined return and make a combined payment of the tax due under this article and article fourteen-A [§ 11-14A-1 et seq.] of this chapter on such fuel. In order to encourage use of a combined return and the making of a single payment each quarter for both taxes, the due date of the return and tax due under article fourteen-A [§ 11-14A-1 et seq.] of this chapter is hereby changed from the last day of January, April, July and October of each calendar year, to the twenty-fifth day of such months, notwithstanding any provision in article fourteen-A [§ 11-14A-1 et seq.] of this chapter to the contrary.

(g) *Dedication of tax to highways.* — All tax collected under the provisions of this section after deducting the amount of any refunds lawfully paid shall be deposited in the "road fund" in the state treasurer's office, and shall be used only for the purpose of construction, reconstruction,

maintenance and repair of highways, and payment of principal and interest on state bonds issued for highway purposes.

(h) *Construction.* — The tax imposed by this article on the use of gasoline or special fuel in this State shall not be construed as taxing any gasoline or special fuel which the State is prohibited from taxing under the constitution of this State or the constitution or laws of the United States.

(i) *Effective date.* — The provisions of this section and the amendments to section three [§ 11-15A-3] of this article shall take effect on the first day of April, one thousand nine hundred eighty-three. (1983, c. 179.)

c. § 11-15-18. Tax on gasoline and special fuel.

(a) *General.* — All sales of gasoline or special fuel by distributors or importers, except when to another distributor for resale in this State, when delivery is made in this State, shall be subject to the tax imposed by this article, notwithstanding any provision of this article to the contrary. Sales of gasoline or special fuel by a person who paid the tax imposed by this article on his purchases of fuel, shall not thereafter be again taxed under the provisions of this article. This section shall be construed so that all gallons of gasoline or special fuel sold and delivered, or delivered, in this State are taxed one time.

(b) *Measure of tax.* — The measure of tax on sales of gasoline or special fuel by distributors or importers shall be the average wholesale price as defined and determined in subsection (c), section thirteen [§ 11-15A-13(c)], article fifteen-A of this chapter. For purposes of maintaining revenue for highways, and recognizing that the tax imposed by this article is generally imposed on gross proceeds from sales to ultimate consumers, whereas the tax on gasoline and special fuel herein is imposed on the average wholesale price of such gasoline and special fuel; in no case, for the purposes of taxation under this article, shall such average wholesale price be deemed to be less than ninety-seven cents per gallon of

gasoline or special fuel for all gallons of gasoline and special fuel sold during the reporting period, notwithstanding any provision of this article to the contrary.

(c) *Definitions.* — For purposes of this section:

(1) "Aircraft" shall include any airplane or helicopter that lands in this State on a regular or routine basis, and transports passengers or freight.

(2) "Aircraft fuel" shall mean gasoline and special fuel suitable for use in any aircraft engine.

(3) "Distributor" shall mean and include every person:

(A) Who produces, manufacturers, processes or otherwise alters gasoline or special fuel in this State for use or for sale; or

(B) Who engages in this State in the sale of gasoline or special fuel for the purpose of resale or for distribution; or

(C) Who receives gasoline or special fuel into the cargo tank of a tank wagon in this State for use or sale by such person.

(4) "Gasoline" shall mean and include any product commonly or commercially known as gasoline, regardless of classification, suitable for use as fuel in an internal combustion engine, except special fuel as hereinafter defined, including any product obtained by blending together any one or more products, with or without other products, if the resultant product is capable of the same use.

(5) "Importer" shall mean and include every person, resident or nonresident, other than a distributor, who receives gasoline or special fuel outside this State for use, sale or consumption within this State, but shall not include the fuel in the supply tank of a motor vehicle that is not a motor carrier.

(6) "Motor carrier" shall mean and include: (A) Any passenger vehicle which has seats for more than nine passengers in addition to the driver, any road tractor, tractor

truck or any truck having more than two axles, which is operated or caused to be operated, by any person on any highway in this State using gasoline or special fuel; and (B) any aircraft, barge or other watercraft, or locomotive transporting passengers or freight in or through this State.

(7) "Motor vehicle" shall mean and include automobiles, motor carriers, motor trucks, motorcycles and all other vehicles or equipment, engines or machines which are operated or propelled by combustion of gasoline or special fuel.

(8) "Retail dealer of gasoline or special fuel" shall mean and include any person not a distributor who sells gasoline or special fuel from a fixed location in this State to users.

(9) "Special fuel" shall mean and include any gas or liquid, other than gasoline, used or suitable for use as fuel in an internal combustion engine. The term "special fuel" shall include products commonly known as natural or casing-head gasoline and shall include gasoline and special fuel for heating any private residential dwelling, building or other premises; but shall not include any petroleum product or chemical compound such as alcohol, industrial solvent, heavy furnace oil, lubricant, etc., not commonly used nor practicably suited for use as fuel in an internal combustion engine.

(10) "Supply tank" shall mean any receptacle on a motor vehicle from which gasoline or special fuel is supplied for the propulsion of the vehicle or equipment located thereon, exclusive of a cargo tank. A supply tank includes a separate compartment of a cargo tank used as a supply tank, and any auxiliary tank or receptacle of any kind or cargo tank, from which gasoline or special fuel is supplied for the propulsion of the vehicle, whether or not such tank or receptacle is directly connected to the fuel supply line of the vehicle.

(11) "Tank wagon" shall mean and include any motor vehicle or vessel with a cargo tank or cargo tanks ordinarily used for making deliveries of gasoline or special fuel, or both, for sale or use.

(12) "Taxpayer" shall mean any person liable for the tax imposed by this article.

(13) "User" shall mean any person who purchases gasoline or special fuel for use or consumption.

(d) *Tax due.* — The tax on sales of gasoline and special fuel shall be paid by each taxpayer on or before the twenty-fifth day of each month, by check, bank draft, certified check or money order, payable to the tax commissioner for the amount of tax due for the preceding month, notwithstanding any provision of this article to the contrary.

(e) *Monthly return.* — On or before the twenty-fifth day of each month, the taxpayer shall make and file a return for the preceding month showing such information as the tax commissioner may require, notwithstanding any provision of this article to the contrary.

(f) *Compliance.* — To facilitate ease of administration and compliance by taxpayers, the tax commissioner may require distributors, importers and other persons liable for the tax imposed by this article on sales of gasoline or special fuel, to file a combined return and make a combined payment of the tax due under this article on sales of gasoline and special fuel, and the tax due under article fourteen [§ 11-14-1 et seq.] of this chapter, on gasoline and special fuel. In order to encourage use of a combined return each month and the making of a single payment each month for both taxes, the due date of the return and tax due under article fourteen [§ 11-14-1 et seq.] of this chapter is hereby changed from the last day of each month to the twenty-fifth day of each month, notwithstanding any provision in article fourteen [§ 11-14-1 et seq.] of this chapter to the contrary.

(g) *Dedication of tax to highways.* — All tax collected under the provisions of this section after deducting the amount of any refunds lawfully paid shall be deposited in the "road fund" in the state treasurer's office, and shall be used only for the purpose of constructing, reconstruction,

maintenance and repair of highways, and payment of principal and interest on state bonds issued for highway purposes.

(h) *Construction.* — This section shall not be construed as taxing any sale of gasoline or special fuel which this State is prohibited from taxing under the constitution of this State or the constitution or laws of the United States.

(i) *Effective date.* — The provisions of this section and the amendments to section nine [§ 11-15-9] of this article shall take effect on the first day of April, one thousand nine hundred eighty-three. (1983, c. 179.)

APPENDIX E

ENROLLED
COMMITTEE SUBSTITUTE
FOR
Senate Bill No. 1

(SENATORS TONKOVICH, MR. PRESIDENT (BY REQUEST) AND HARMAN, *original sponsors*)

[Passed July 23, 1986; in effect from passage.]

AN ACT to repeal section twenty-six, article fifteen-a, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended; to amend and reenact sections one, two, three, four, five, six, seven, eight, ten, eleven, thirteen, eighteen, twenty-one and twenty-two, article fifteen-a of said chapter; and to further amend said article fifteen-a by adding thereto two new sections, designated sections three-a and ten-a, all relating to the compensating use tax; defining terms used therein; imposing tax on the use in this state of tangible personal property; exempting from tax property that is per se exempt from the consumers sales and service tax; exempting from payment of the use tax transactions for which persons may issue an exemption certificate under the consumers sales and service tax for the same type of property; exempting sales of property upon which the consumers sales and service tax has been paid; and exempting tangible personal property brought into the state by a nonresident for his or her use or enjoyment while temporarily in this state; providing rule for determining tax when a nonresident person or business moves into this state; creating presumption that tangible personal property sold for delivery in this state was sold for use or other consumption in this state; providing for tax to be collected by retailers or remitted direct-

ly to the state tax commissioner; requiring retailers engaging in business in this state and making sales of tangible personal property for delivery into this state or with the knowledge, directly or indirectly, that the property is intended for use in this state to collect the use tax; permitting retailers not engaging in business in this state to collect the use tax; prohibiting retailers from absorbing tax; making it a misdemeanor to absorb tax; requiring quarterly remittance of collected tax by retailers; requiring users who do not pay tax to a retailer to quarterly remit such tax directly to the tax commissioner; authorizing credit against tax due on use of tangible personal property for which sales tax was lawfully paid in another state; allowing such credit to be applied against tax due on gasoline and special fuel consumed in this state after the thirtieth day of June, one thousand nine hundred eighty-five, which was subject to sales tax in another state; providing for imposition of use tax on gasoline and special fuels consumed in this state; providing rules for imposition and calculation of such tax; authorizing tax commissioner to semiannually determine average wholesale price of gasoline and special fuel, with such average wholesale price of gasoline and special fuel, with such average wholesale price to not be less than ninety-seven cents per gallon; providing rules for computation of tax due from motor carriers and for returns and payment of tax; dedicating such tax to highways; providing rules for construction of such tax; expressing legislative intent to tax gasoline and special fuel used or consumed in this state after the thirtieth day of June, one thousand nine hundred eighty-five, prohibiting the tax commissioner from refunding or establishing a credit for tax paid subsequent to said thirtieth day of June, when such claim for refund or credit is based on purported nonexistence of the tax; placing burden on seller to prove that sale was not at retail; providing for this burden to be met by seller taking, in good faith, a properly executed exemption certificate signed by the purchaser; requiring retailers to keep books and records; authorizing tax com-

missioner to examine such books and records; authorizing tax commissioner to revoke the business registration certificate of a retailer engaging in business in this state or of a retailer not engaging in business in this state who is registered to collect use tax for failure to comply with the requirements of the use tax law; and providing effective dates.

Be it enacted by the Legislature of West Virginia:

That section twenty-six, article fifteen-a, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be repealed; that sections one, two, three, four, five, six, seven, eight, ten, eleven, thirteen, eighteen, twenty-one and twenty-two, article fifteen-a, chapter eleven of said code be amended and reenacted; and that said article fifteen-a be further amended by adding thereto two new sections, designated sections three-a and ten-a, all to read as follows:

ARTICLE 15A. USE TAX.

§ 11-15A-1. Definitions.

The following words, terms and phrases, when used in this article, have the meanings ascribed to them in this section, except where the context clearly indicates that a different meaning is required:

(1) "Business" means any activity engaged in by any person, or caused to be engaged in by any person, with the object of direct or indirect economic gain, benefit or advantage, and includes any purposeful revenue generating activity in this state.

(2) "Consumer" means any person purchasing tangible personal property from a retailer as defined in paragraph (7).

(3) "Lease" includes rental, hire and license.

(4) "Person" includes any individual, firm, partnership, joint venture, joint stock company, association, public or private corporation, cooperative, estate, trust, business

trust, receiver, executor, administrator, any other fiduciary, any representative appointed by order of any court or otherwise acting on behalf of others, or any other group or combination acting as a unit, and the plural as well as the singular number.

(5) "Purchase" means any transfer, exchange or barter, conditional or otherwise, in any manner or by any means whatsoever, for a consideration.

(6) "Purchase price" means the total amount for which tangible personal property is sold, valued in money, whether paid in money or otherwise: *Provided*, That cash discounts allowed and taken on sales shall not be included.

(7) "Retailer" means and includes every person engaging in the business of selling, leasing or renting tangible personal property for use within the meaning of this article, or in the business of selling, at auction, tangible personal property owned by the person or others for use in this state: *Provided*, That when in the opinion of the tax commissioner it is necessary for the efficient administration of this article to regard any salesmen, representatives, truckers, peddlers or canvassers as the agents of the dealers, distributors, supervisors, employees or persons under whom they operate or from whom they obtain the tangible personal property sold by them, irrespective of whether they are making sales on their own behalf or on behalf of such dealers, distributors, supervisors, employers or persons, the tax commissioner may so regard them and may regard the dealers distributors, supervisors, employers, or persons as retailers for purposes of this article.

(8) "Retailer engaging in business in this state" or any like term, unless otherwise limited by federal statute, shall mean and include but not be limited to any retailer having or maintaining, occupying or using, within this state directly or by a subsidiary, an office, distribution house, sales house, warehouse, or other place of business, or any agent (by whatever name called) operating within this state, under the authority of the retailer or its subsidiary,

irrespective of whether such place of business or agent is located here permanently or temporarily, or whether such retailer or subsidiary is admitted to do business within this state prusuant to section forty-nine, article one, chapter thirty-one of this code.

(9) "Sale" means any transaction resulting in the purchase of tangible personal property from a retailer.

(10) "Seller" means a retailer, and includes every person selling or leasing tangible personal property in a transaction which is subject to the tax imposed by this article.

(11) "Tax commissioner" or "commissioner" means the state tax commissioner, or his delegate.

(12) "Tangible personal property" means tangible goods, wares and merchandise when sold by a retailer for use in this state.

(13) "Taxpayer" includes any person within the meaning of this section, who is subject to a tax imposed by this article, whether acting for himself or as a fiduciary.

(14) "Use" means and includes the exercise by any person of any right or power over tangible personal property incident to the ownership, possession or enjoyment of such property, or by any transaction in which possession of or the exercise of any right or power over tangible personal property is acquired for a consideration, including any lease, rental or conditional sale of tangible personal property. As used in this definition, "enjoyment" includes a purchaser's right to direct the disposition of the property, whether or not the purchaser has possession of the property. The term "use" does not include the keeping, retaining or exercising any right or power over tangible personal property for the purpose of subsequently transporting it outside this state for use thereafter solely outside this state.

§ 11-15A-2. Imposition of tax.

(a) *General.* — An excise tax is hereby levied and imposed on the use in this state of tangible personal property to be collected and paid as hereinafter provided, at the rate of five percent of the purchase price of such property.

(b) Said tax is hereby imposed upon every person using tangible personal property within this state. That person's liability is not extinguished until such tax has been paid. A receipt with the tax separately stated thereon issued by a retailer engaged in business in this state, or by a foreign retailer who is authorized by the tax commissioner to collect the tax imposed by this article, relieves the purchaser from further liability for the tax to which the receipt refers.

(c) Purchases of tangible personal property made from the government of the United States or any of its agencies by ultimate consumers shall be subject to the tax imposed by this section. Industrial materials and equipment owned by the federal government within the state of West Virginia of a character not ordinarily readily obtainable within the state, shall not be subject to use tax when sold, if such industrial materials and equipment would not be subject to use taxes if such were sold outside of the state for use in West Virginia.

(d) This article shall not apply to purchases made by counties or municipal corporations.

§ 11-15A-3. Exemptions.

The use in this state of the following tangible personal property is hereby specifically exempted from the tax imposed by this article:

(1) All articles of tangible personal property brought into the state of West Virginia by a nonresident individual thereof for his or her use or enjoyment while temporarily within this state or while passing through this state, except

gasoline and special fuel: *Provided*, That fuel contained in the supply tank of a motor vehicle that is not a motor carrier shall not be taxable.

(2) Tangible personal property, the gross receipts from the sale of which are exempt from the sales tax by the terms of article fifteen, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, and the property is being used for the purpose for which it was exempted.

(3) Tangible personal property, the gross receipts from the sale of which are derived from the sale of machinery, supplies and materials to contractors, or to persons engaged in the business of manufacturing, transportation, transmission, communication or in the production of natural resources in this state: *Provided*, That purchases of gasoline or special fuel from distributors or importers shall be taxable.

(4) Tangible personal property, the gross receipts or the gross proceeds from the sale of which are required to be included in the measure of the tax imposed by article fifteen, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, and upon which the tax imposed by said article fifteen has been paid.

(5) Tangible personal property, the sale of which in this state is not subject to the West Virginia consumers sales tax.

(6) Mobile homes utilized by the owners thereof as their principal year-round residence and dwelling: *Provided*, That use of these mobile homes shall be subject to tax at the three percent rate.

§ 11-15A-3a. Moving residence or business into state.

The tax imposed by this article shall not apply to tangible personal property purchased outside this state for use outside this state by a person who at that time was a nonresident natural person, or a business entity not actually doing business within this state, who or which later brings such tangible personal property into this state in

connection with his establishment of a permanent residence or business in this state: *Provided*, That such property was purchased more than six months prior to the date it was first brought into this state, or six months prior to the establishment of such residence or business, whichever first occurs.

§ 11-15A-4. Evidence of use.

For the purpose of the proper administration of this article to prevent evasion of the tax, evidence that tangible personal property was sold by any person for delivery in this state shall be prima facie evidence that such tangible personal property was sold for use in this state.

§ 11-15A-5. How collected.

The tax herein imposed shall be collected in the following manner:

(1) The tax upon the use of all tangible personal property, which is sold by a retailer engaging in business in this state, or by such other retailer as the tax commissioner shall authorize pursuant to section seven of this article shall be collected by such retailer and remitted to the state tax commissioner, pursuant to the provisions of sections six through ten, inclusive, of this article.

(2) The tax upon the use of all tangible personal property not paid pursuant to subsection one of this section shall be paid to the tax commissioner directly by any person using such property within this state, pursuant to the provisions of section eleven of this article.

§ 11-15A-6. Collection by retailer.

(a) Every retailer engaging in business in this state and making sales of tangible personal property for delivery into this state, or with the knowledge, directly or indirectly, that the property is intended for use in this state, that are not exempted under the provisions of section three of this

article, shall at the tme of making such sales, whether within or without the state, collect the tax imposed by this article from the purchaser, and give to the purchaser a receipt therefor in the manner and form prescribed by the tax commissioner, if the tax commissioner shall, by regulation, so prescribe.

(b) Each such retailer shall list with the tax commissioner the name and address of all his agents operating in this state, and the location of any and all distribution or sales houses or offices or other places of business in this state.

§ 11-15A-7. Foreign retailers.

The tax commissioner may, in his discretion, upon application authorize the collection of the tax herein imposed by any retailer not engaging in business within this state, who, to the satisfaction of the tax commissioner, furnishes adequate security to insure collection and payment of the tax. Such retailer shall be issued, without charge, a permit to collect such tax in such manner, and subject to such regulations and agreements as the tax commissioner shall prescribe. When so authorized, it shall be the duty of such retailer to collect the tax upon all tangible personal property sold to his knowledge for use within this state, in the same manner and subject to the same requirements as a retailer engaging in business within this state. Such authority and permit may be canceled when, at any time, the tax commissioner considers the security inadequate, or that such tax can more effectively be collected from the person using such property in this state.

§ 11-15A-8. Absorbing tax; criminal penalty.

It shall be unlawful for any retailer to advertise or hold out or state to the public or to any purchaser, consumer or user, directly or indirectly, that the tax or any part thereof imposed by this article will be assumed or absorbed by the

retailer or that it will not be added to the selling price of the property sold, or if added that it or any part thereof will be refunded. The tax commissioner shall have the power to adopt and promulgate rules and regulations for adding such tax, or the equivalent thereof, by providing different methods applying uniformly to retailers within the same general classification for the purpose of enabling such retailers to add and collect, as far as practicable, the amount of such tax. Any person violating any of the provisions of this section within this state shall be guilty of a misdemeanor and subject to the penalties provided in section twenty of this article.

§ 11-15A-10. Payment to tax commissioner.

Each retailer required or authorized, pursuant to section six or seven, to collect the tax herein imposed, shall be required to pay to the tax commissioner the amount of such tax on or before the fifteenth day of the month next succeeding each quarterly period. At such time, each retailer shall file with the tax commissioner a return for the preceding quarterly period in such form as may be prescribed by the tax commissioner showing the sales price of any or all tangible personal property sold by the retailer during such preceding quarterly period, the use of which is subject to the tax imposed by this article, and such other information as the tax commissioner may deem necessary for the proper administration of this article. The return shall be accompanied by a remittance of the amount of such tax, for the period covered by the return: *Provided*, That where such tangible personal property is sold under a conditional sales contract, or under any other form of sale wherein the payment of the principal sum, or a part thereof is extended over a period longer than sixty days from the date of sale thereof, the retailer may collect and remit each quarterly period that portion of the tax equal to five percent of that portion of the purchase price actually received during such quarterly period. The tax commissioner, if he

deems it necessary in order to insure payment to the state of the amount of such tax, may in any or all cases require returns and payments of such amount to be made for other than quarterly periods. The tax commissioner may, upon request and a proper showing of the necessity therefor, grant an extension of time not to exceed thirty days for making any return and payment. Returns shall be signed by the retailer or his duly authorized agent, and must be certified by him to be correct.

§ 11-15A-10a. Credit for sales tax liability paid to another state.

(a) A person is entitled to a credit against the tax imposed by this article on the use of a particular item of tangible personal property equal to the amount, if any, of sales tax lawfully paid to another state for the acquisition of that property: *Provided*, That the amount of credit allowed shall not exceed the amount of use tax imposed on the use of the property in this state.

(b) For purposes of this section:

(1) "Sales tax" includes a sales tax or compensating use tax imposed on the use of tangible personal property by the state in which the sale occurred; and

(2) "State" includes the District of Columbia but does not include any of the several territories organized by Congress.

(c) This section shall apply to claims for refund or credit of use tax filed after the thirty-first day of August, one thousand nine hundred eighty-six, for taxable purchases made on or after the first day of July, one thousand nine hundred eighty-five, that were legally subject to a sales tax or compensating use tax paid in another state and then also taxed under this article.

§ 11-15A-11. Liability of user.

Any person who uses any tangible personal property upon which the tax herein imposed has not been paid either to a retailer or direct to the tax commissioner as herein provided, shall be liable therefor, and shall on or before the fifteenth day of the month next succeeding each quarterly period pay the tax herein imposed upon all such property used by him during the preceding quarterly period in such manner and accompanied by such returns as the tax commissioner shall prescribe. All of the provisions of section ten with reference to such returns and payments shall be applicable to the returns and payments herein required.

§ 11-15A-13. Tax on gasoline and special fuel.

(a) *Imposition of tax.*

(1) *On deliveries in this state.*—Gasoline or special fuel furnished or delivered within this state to consumers or users is subject to tax at the rate imposed by section two of this article: *Provided*, That the amount of tax due under section two shall in no event be less than five percent of the average wholesale price of gasoline and special fuel and with such price to, in no case, be deemed to be less than ninety-seven cents per gallon for all gallons of gasoline and special fuel taxable under section two of this article.

(2) *On purchases out of state.*—An excise tax is hereby imposed on the use or consumption in this state of gasoline or special fuel purchased outside this state at the rate of five percent of the average wholesale price of such gasoline or special fuel, as determined under subsection (c), notwithstanding any provision of this article to the contrary: *Provided*, That gasoline or special fuel contained in the supply tank of a motor vehicle that is not a motor carrier shall not be taxable, except that gasoline or special fuel imported in the supply tank or auxiliary tank of construction equipment, mining equipment, track

maintenance equipment or other similar equipment, shall be taxed in the same manner as that in the supply tank of a motor carrier.

(b) *Definitions.*—Terms used in this section shall have the same meaning as when used in a comparable context in section eighteen, article fifteen of this chapter.

(c) *Determination of average wholesale price.*

(1) To simplify determining the average wholesale price of all gasoline and special fuel, the tax commissioner shall, effective with the period beginning the first day of the month of the effective date of this section and each first day of January, annually, thereafter, determine the average wholesale price of gasoline and special fuel for each annual period, on the basis of sales data gathered for the preceding period of the first day of July through the thirty-first day of October. Notification of the average wholesale price of gasoline and special fuel shall be given by the tax commissioner at least thirty days in advance of each first day of January, annual period, by filing notice of the average wholesale price in the state register, and by such other means as the tax commissioner deems reasonable: *Provided*, That notice of the average wholesale price of gasoline and special fuel for the first period shall be timely given if filed in the state register on the effective date of this section.

(2) The "average wholesale price" shall mean the single, statewide average per gallon wholesale price, rounded to the third decimal (thousandth of a cent), exclusive of state and federal excise taxes on each gallon of gasoline or diesel fuel, as determined by the tax commissioner from information furnished by distributors of gasoline or special fuel in this state, or such other information regarding wholesale selling prices as the tax commissioner may gather, or a combination of such information: *Provided*, That in no event shall the average wholesale price be determined to be less than ninety-seven cents per gallon of gasoline or special fuel.

(3) All actions of the tax commissioner in acquiring data

necessary to establish and determine the average wholesale price of gasoline and special fuel, in providing notification of his determination prior to the effective date of any change in rate, and in establishing and determining the average wholesale price of fuel, may be made by the tax commissioner without compliance with the provisions of article three, chapter twenty-nine-a of this code.

(4) In any administrative or court proceeding brought to challenge the average wholesale price of gasoline and special fuel as determined by the tax commissioner, his determination shall be presumed to be correct and shall not be set aside unless it is clearly erroneous.

(d) *Computation of tax due from motor carriers.*— Every person who operates or causes to be operated a motor carrier in this state shall pay the tax imposed by this section on the average wholesale price of all gallons of gasoline or special fuel used in the operation of any motor carrier within this state, under the following rules:

(1) The total amount of gasoline or special fuel used in the operation of the motor carrier within this state shall be that proportion of the total amount of gasoline and special fuel used in any motor carrier's operations within and without this state, that the total number of miles traveled within this state bears to the total number of miles traveled within and without this state.

(2) A motor carrier shall first determine the gross amount of tax due under this section on the average wholesale value, determined under subsection (c), of all gasoline and special fuel used in the operation of the motor carrier within this state during the preceding quarter, as if all gasoline and special fuel had been purchased outside this state.

(3) Next, the taxpayer shall determine the total tax paid under article fifteen of this chapter on all gasoline and special fuel purchased in this state for use in the operation of the motor carrier.

(4) The difference between (2) and (3) is the amount of tax due under this article when (2) is greater than (3), or the

amount to be refunded or credited to the motor carrier when (3) is greater than (2), which refund or credit shall be allowed in the same manner and under the same conditions as a refund or credit is allowed for the tax imposed by article fourteen-a of this chapter.

(e) *Return and payment of tax.*—Tax due under this article on the uses or consumption in this state of gasoline or special fuel shall be paid by each taxpayer on or before the twenty-fifth day of January, April, July and October of each year, notwithstanding any provision of this article to the contrary, by check, bank draft, certified check or money order, payable to the tax commissioner, for the amount of tax due for the preceding quarter. Every taxpayer shall make and file with his remittance, a return showing such information as the tax commissioner may require.

(f) *Compliance.*—To facilitate ease of administration and compliance by taxpayers, the tax commissioner may require motor carriers liable for the taxes imposed by this article on the use of gasoline or special fuel in the operation of motor carriers within this state, and the tax imposed by article fourteen-a of this chapter on such gallons of fuel, to file a combined return and make a combined payment of the tax due under this article and article fourteen-a of this chapter on such fuel. In order to encourage use of a combined return and the making of a single payment each quarter for both taxes, the due date of the return and tax due under article fourteen-a of this chapter is hereby changed from the last day of January, April, July and October of each calendar year, to the twenty-fifth day of such months, notwithstanding any provisions in article fourteen-a of this chapter to the contrary.

(g) *Dedication of tax to highways.*—All tax collected under the provisions of this section after deducting the amount of any refunds lawfully paid shall be deposited in the "road fund" in the state treasurer's office, and shall be used only for the purpose of construction, reconstruction, maintenance and repair of highways, and payment of

principal and interest on state bonds issued for highway purposes.

(h) *Construction.*—The tax imposed by this article on the use of gasoline or special fuel in this state shall not be construed as taxing any gasoline or special fuel which the state is prohibited from taxing under the constitution of this state or the constitution or laws of the United States.

(i) *Effective date.*—The provisions of this section and the amendments of section three of this article took effect on the first day of April, one thousand nine hundred eighty-three.

(j) *Validation.*—Inasmuch as there is currently litigation challenging the lawfulness of this section in the situation where a motor carrier purchases gasoline or special fuel in another state paying to that other state a sales tax thereon and then consumes that gasoline or special fuel in its operation of a motor carrier in this state, without being statutorily allowed a credit for such sales tax against the tax imposed by this article with respect to such gallonage of tax paid fuel consumed in this state; and inasmuch as section ten-a of this article reestablishes the allowance of such a credit and makes such allowance effectively retroactive and applicable to gasoline and special fuel consumed in this state after the thirtieth day of June, one thousand nine hundred eighty-five, the purported constitutional infirmity is cured. To avoid any question about whether this section was in effect subsequent to the thirtieth day of June, one thousand nine hundred eighty-five, this section is reenacted and expressly made retroactive to the first day of July, one thousand nine hundred eighty-five, and the tax commissioner shall not refund or credit any tax previously paid under this section due to a claim that the tax was not lawfully imposed subsequent to the thirtieth day of June, one thousand nine hundred eighty-five.

§ 11-15A-18. Seller must show sale not at retail; presumption.

The burden of proving that a sale was not taxable shall be upon the seller, unless he, in good faith, takes from the purchaser a certificate signed by and bearing the address of the purchaser setting forth the reason for exemption of the sale from imposition of the tax. To prevent evasion it shall be presumed that all proceds are subject to the tax until the contrary is clearly established. This certificate shall be substantially in the form prescribed by the tax commissioner.

§ 11-15A-21. Books; examination.

(a) Every retailer required or authorized to collect taxes imposed by this article and every person using in this state tangible personal property purchased on or after the first day of July, one thousand nine hundred fifty-one, shall keep such records, receipts, invoices, and other pertinent papers as the tax commissioner shall require, in such form as the tax commissioner shall require.

(b) In addition to the tax commissioner's powers set forth in article ten of this chapter, the tax commissioner or any of his duly authorized agents is hereby authorized to examine the books, papers, records and equipment of any person who either:

(1) Is selling tangible personal property; or

(2) Is liable for the tax imposed by this article, and to investigate the character of the business of any such person in order to verify the accuracy of any return made, or if no return was made by such person, to ascertain and determine the amount due under the provisions of this article. Any such books, papers and records shall be made available within this state for such examination upon reasonable notice when the tax commissioner shall deem it advisable and shall so order. However, where the taxpayer's records must be kept out-of-state, the taxpayer may upon being notified by the tax commissioner that an examination is to be made, elect to do one of the following: (1) Forthwith transport the required records to a convenient point in West

Virginia and notify the tax commissioner that they are available; or (2) pay the reasonable traveling expenses of the tax commissioner's representatives from Charleston, West Virginia, to the out-of-state place where the records are kept, and return, and reasonable living expenses of such representatives while engaged in their examination.

§ 11-15A-22. Canceling or revoking permits.

Whenever any retailer engaging in business in this state, or authorized to collect the tax herein imposed pursuant to section seven of this article, fails to comply with any of the provisions of this article or any orders, rules or regulations of the tax commissioner prescribed and adopted for this article under article ten of this chapter, the tax commissioner may, upon notice and hearing, hereinafter provided, by order, cancel the business registration certificate, if any, issued to such retailer under article twelve, chapter eleven of the code of West Virginia, one thousand nine hundred thirty-one, as amended, or if such retailer is a corporation authorized to do business in this state under section forty-nine, article one, chapter thirty-one of said code, may certify to the secretary of state a copy of an order finding that such retailer has failed to comply with certain specified provisions, orders, rules or regulations. The secretary of state shall, upon receipt of such certified copy, revoke the permit authorizing said corporation to do business in this state, and shall issue a new permit only when such corporation shall have obtained from the tax commissioner an order finding that such corporation has complied with its obligations under this article. No order authorized in this section shall be made until the retailer is given an opportunity to be heard and to show cause why such order should not be made, and he shall be given twenty days' notice of the time, place and purpose of such hearing, which shall be heard as provided in section nine, article ten of this chapter. The tax commissioner shall have the power in his discretion to issue a new business registration certificate after such canceling.